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A JUDGE SHAPES AND MANAGES INSTITUTIONAL REFORM: SCHOOL DESEGREGATION IN BUFFALO

JUDY SCALES-TRENT*

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* Associate Professor, Law School, S.U.N.Y. at Buffalo. This paper grew out of a seminar which I developed and taught with Professor Adeline Levine of the Sociology Department at State University of New York at Buffalo, on law and social change, as seen through the process of school desegregation in Buffalo. We spent many long months planning, reading, and discussing the issues which infuse the study of social change and the role of law in that process. My understanding of those issues has been greatly enriched by her knowledge. Her contribution to my education, and therefore, to this paper, is a major one, and I thank her for it. Thanks are due also to the Baldy Foundation which provided us with funding to develop this course. I also thank the speakers who gave so generously of their time by speaking to the seminar on the role they played in the school desegregation process: Judge John Curtin, School Superintendent Eugene Reville, Frank Mesiah, Marilyn Hochfield, and David Jay. In addition, their comments on an earlier draft of this Article were most helpful. Thanks also go to Carole Streiff for her comments on an earlier draft, as well as the time she spent discussing the case with us.

I must also thank the students in both the 1987 and 1988 seminars, whose insight and questions pushed me along, and whose research fleshed out my understanding of the process of school desegregation in Buffalo; and my colleagues, Frank Munger, Bette Mensch, and Barry Boyer, for their helpful comments on an earlier draft of this Article.

And finally, I express my appreciation to my father, William J. Trent, Jr., who led me to this task so long ago.

Note: Although the *Review of Law and Social Change* prefers the term "African-American," I use the term "black" in this Article both to achieve consistency with other material used in this Article, and because I prefer not to change my group name.

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INTRODUCTION

In April of 1976, Judge John Curtin of the Western District of New York held that the city of Buffalo had created and maintained segregated schools in violation of the Equal Protection Clause of the Constitution, and ordered the desegregation of the school system.¹ He urged the community to look upon

1. *Arthur v. Nyquist*, 415 F. Supp. 904, 960 (W.D.N.Y. 1976), *aff'd in part, rev'd in part, remanded in part*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978).

Desegregation of the Buffalo schools was accomplished through a still ongoing series of legal actions against the Buffalo Board of Education, the Buffalo Superintendent of Schools, the Common Council and the mayor.

The federal district court found that the Buffalo public school system was deliberately segregated and held the Buffalo Board of Education, the Buffalo Superintendent of Schools, the Common Council, the New York State Commissioner of Education and the members of the State Board of Regents liable. *Arthur v. Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976), *aff'd in part, rev'd in part, remanded in part*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978) [hereinafter *Nyquist I*]; see *infra* notes 14-18 and accompanying text.

Defendants appealed the decision, and the Second Circuit affirmed the district court's finding that three defendants — the Board of Education, the Superintendent of Schools, and the Common Council — were liable for unlawful segregative acts. The circuit court, however, reversed the lower court's finding of liability for the New York State Education Commissioner and members of the State Board of Regents due to insufficient evidence. The circuit court remanded the case to the district court for creation of an appropriate remedy. *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1976), *cert. denied*, 439 U.S. 860 (1978) [hereinafter *Nyquist I*].

In 1979, plaintiffs returned to the district court and convinced the court that a system-wide remedy was required to ensure desegregation. *Arthur v. Nyquist*, 473 F. Supp. 830 (W.D.N.Y. 1979) [hereinafter *Nyquist II*]; see *infra* notes 61-63 and accompanying text. In an effort to fulfill the court's mandate to desegregate, defendant school board implemented a plan entitled "Phase III" which the district court approved by court order. See *infra* notes 66-70 and accompanying text. Dissatisfied with Phase III, plaintiffs appealed to the Second Circuit. The circuit court remanded without deciding the merits of the appeal citing the paucity of factual finding concerning the relative successes of Phase III. *Arthur v. Nyquist*, 636 F.2d 905 (2d Cir.), *on remand*, 514 F. Supp. 1133 (W.D.N.Y. 1981) [hereinafter *Nyquist III*]. The district court then approved a revised school board plan called "Phase IIIx." *Arthur v. Nyquist*, 514 F. Supp. 1133 (W.D.N.Y. 1981) [hereinafter *Nyquist III*]; see *infra* notes 74-79 and accompanying text.

In 1981, the Buffalo's teachers union filed a motion alleging that the Board's plan to remedy racial discrimination in staff hiring procedures violated provisions of New York Education Law and breached a collective bargaining agreement. The court denied plaintiffs' motion, holding that the Board's implementation of the policy was undertaken in a good faith effort to comply with the provisions of the remedial court order. *Arthur v. Nyquist*, 520 F. Supp. 961 (W.D.N.Y. 1981), *appeal dismissed*, 697 F.2d 287 (2d Cir. 1982), *aff'd in part, rev'd in part and remanded*, 712 F.2d 816 (2d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) [hereinafter *Nyquist IV*]. At first, the Second Circuit dismissed defendants' appeal. *Arthur v. Nyquist*, 697 F.2d 287 (2d Cir. 1982) [hereinafter *Nyquist IV*]. When the Second Circuit finally decided to hear the appeal, it rejected two of the three challenges the teachers' union raised to the remedial plan. The court did find, however, that the plan's treatment of laid-off probationary and permanent teachers was unduly harsh. *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983) [hereinafter *Nyquist IV*]; see *infra* note 61.

Once the desegregation plan was fully implemented, conflicts over funding and budgeting arose between the Board of Education and the mayor and Common Council. In 1982, the school board returned to court, asking it to require the mayor and Common Council to appro-

the task of desegregation not as a difficult chore, but rather as an opportunity to create better schools and a better community in Buffalo.² Quoting the words Tennyson had Ulysses use when exhorting his friends and followers, Judge Curtin said: "Come my friends, 'tis not too late to seek a new world."³ Almost ten years later, the *New York Times* noted that Buffalo is considered a "national model of integration."⁴ There has been no white flight, and scores on standardized achievement tests are up.⁵ Educators come from around the world to see how the Buffalo school system works.⁶ This is an astonishing phenomenon in a city which had been called "the most segregated city in the Northeast,"⁷ and which had supported school board tactics designed to further segregation within the school system for decades.

In the period between the Supreme Court's 1954 decision in *Brown v. Board of Education*⁸ and Judge Curtin's decision in 1976, many district courts tried to follow the Court's mandate to desegregate, with varying degrees of success. In Boston, for example, the district court's order to desegregate led to years of intransigence and violence around the desegregation issue, while in Denver, desegregation was largely peaceful. This Article will look at the efforts of the district court judge in Buffalo to see specifically how he managed the institutional reform of the schools so as to maximize the likelihood of peaceful desegregation and productive integration. This Article will focus on the judge's role in shaping and managing desegregation as a way of under-

appropriate more money for the plan. Agreeing with the Board, the district court ordered defendants to appropriate an additional \$7.4 billion to enable the board to comply with the court-ordered desegregation plan. *Arthur v. Nyquist*, 547 F. Supp. 460 (W.D.N.Y. 1982), *aff'd*, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 466 U.S. 930 (1984) [hereinafter *Nyquist V*]. The Second Circuit upheld the district court's authority to order such additional appropriation. *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983) [hereinafter *Nyquist V*]; see *infra* note 83 and accompanying text.

Discouraged with the pace of desegregation, plaintiffs filed a motion to require the Board of Education to devise a new plan to increase the number of majority students at three elementary schools. The district court denied plaintiffs' motion, finding that a further desegregation of Buffalo's schools was not practicable, and that imposition of any new measures would be counterproductive. *Arthur v. Nyquist*, 566 F. Supp. 511 (W.D.N.Y. 1983) [hereinafter *Nyquist VI*].

Finally, in 1985, the Board was again in conflict with the mayor and the Common Council over funding. The district court had arranged for a magistrate to oversee these issues and render reports and recommendations to the district court for approval. Plaintiffs and defendants disagreed with several of the magistrate's findings and recommendations. The district court agreed with the magistrate's report and recommendations and ordered the Board to submit a proposal for the budget. *Arthur v. Nyquist*, 618 F. Supp. 804 (W.D.N.Y. 1985) [hereinafter *Nyquist VII*]. See generally *infra* notes 84-88 and accompanying text.

2. Transcript of proceedings held before Hon. John Curtin at 75-77 (July 9, 1976) [hereinafter *Proceedings*].

3. *Id.* at 77-78.

4. *N.Y. Times*, May 13, 1985, at A1, col. 5.

5. *Id.*, at B4, col. 1; Rossell, *The Buffalo Controlled Choice Plan*, 22 *URBAN EDUCATION* 328, 341-42, 348-49 (1987).

6. *N.Y. Times*, May 13, 1985, at B4, col. 1.

7. Address by Superintendent Eugene Reville, seminar lecture at Sociology Dept. at State Univ. of N.Y. at Buffalo at 2 (Mar. 26, 1988) [hereinafter *Reville Tr.*].

8. 347 U.S. 483 (1954).

standing and assessing this process of social reform in Buffalo. It will also look at the question of whether or not the judge has been successful at this task. In particular, this Article will look at the various definitions of "success" used by major actors in this process, and will analyze the relative "success" of desegregation in Buffalo. Finally, this Article will present Judge Curtin's role as an example of a new role for the judiciary in institutional reform cases, a role which raises questions as to the court's competence and its integrity. It will show how Judge Curtin addressed these problems in the process of managing the reform of the school system. This Article will also discuss the relationship of his model of judicial action with the role of courts in a democracy.

The first section, the history of *Arthur v. Nyquist* from the filing date in 1972 until 1988, provides a context, a set of facts which gives us the basic material for the subsequent analyses of the desegregation process. The second section looks at the role which Judge Curtin played over the years as he shaped and managed the reform of the Buffalo Public School system in order to bring it into line with the values of the Constitution. Three specific areas where his role was crucial to the success of desegregation will be considered: (1) the *planning* phase, where he re-focused the energy of the community toward building a better school system and insisted on total community involvement in that process; (2) setting the *pace* for desegregation in a way which would maximize the outcome he sought; and (3) the personal role he has played in actively *monitoring* the process so as to have sufficient information to channel the restructuring process properly. The third section looks at the role played by major institutional actors in Buffalo — the school board and the religious community — in the desegregation process. This section suggests that without the unwavering and interlocking support of these actors for the judge's orders, it is unlikely that desegregation would have been as peaceful as it was.

Section four turns to the question of whether the result of the judge's long intervention in restructuring the school system has been, as the *New York Times* puts it, a "national model of integration."⁹ Has the integration of the school system really been successful? What does "successful" mean in this context? Does it mean that black school children are receiving a better education? Does it mean that there is an improvement in interracial harmony? Or, does it merely mean that black and white children are in the same school buildings? This section will show how representatives of plaintiffs, the school superintendent and Judge Curtin define "success," and how they view desegregation in Buffalo in light of that definition.¹⁰

9. See *supra* note 4.

10. Guest speakers at the seminar sessions which launched this Article, see *supra* note *, included the Honorable John Curtin, federal district court judge for the Western District of New York; Eugene Reville, Superintendent of the Buffalo Public School System; Frank Mesiah, representative of plaintiffs NAACP and Citizens Committee for Human Rights (CCHR) and co-chair of CCHR; Marilyn Hochfield, who worked on the lawsuit in the liability phase, first as

In section five, this Article addresses jurisprudential concerns which are illuminated by an understanding of Judge Curtin's role in the Buffalo school desegregation case. First, it looks at the framework of institutional reform cases such as this one, and notes criticisms which suggest that the courts have institutional constraints that make them less suited for this kind of work than legislative or administrative bodies. It will then show how Judge Curtin addressed those institutional limits in this case in order to act effectively. Judge Curtin's primary technique for meeting the inadequacies in the court system involved reaching out to the community, bringing the community into the decision-making process. This section will also address the question of whether the technique Judge Curtin created is an example of John Ely's "participation-oriented, representation-reinforcing" approach to judicial review, an approach which, in Ely's view, harmonizes the goals of popular control and egalitarianism in the judicial process.

I.

HISTORY OF *ARTHUR V. NYQUIST*

In 1972, the Buffalo branch of the National Association for the Advancement of Colored People ("NAACP"), the Citizens' Council on Human Relations ("CCHR"), and various black and white parents in Buffalo joined to file suit against the city and state for violations of the constitutional right of black children to equal, thus, not segregated, education.¹¹ When suit was filed, the

a law student volunteer, then as an attorney; and David Jay, counsel to plaintiffs during the remedy phase of the litigation. Their comments were taped during these class visits and form the basic material for this Article.

11. Although the NAACP was a named plaintiff in this suit, it was not as active in developing and pursuing this litigation as was the CCHR, a local interracial group which had been formed in early 1963 to address civil rights problems in Buffalo. Address by Frank Mesiah, representative of plaintiffs NAACP and CCHR and co-chair of CCHR, seminar lecture at Law School at State Univ. of N.Y. at Buffalo at 3 (1987) [hereinafter Mesiah Tr. 1987]. Two of the seminar speakers, Frank Mesiah and Marilyn Hochfield, were active in CCHR from its inception. *Id.* at 4; see Address by Marilyn Hochfield, Attorney for plaintiffs, seminar lecture at Law School at State Univ. of N.Y. at Buffalo at 6 (1987) [hereinafter Hochfield Tr.].

This was not the first time that black parents in Buffalo had taken formal steps to end the segregation of the school system. In the 1840's, they petitioned the Common Council to allow black children to attend the white schools, because of the poor education they were receiving in the black schools. Although the Council recommended denial of admission to the black students at that time, the schools were finally integrated in 1872 at the school superintendent's request. See generally White, *The Black Movement Against Jim Crow Education in Buffalo New York, 1800 - 1900*, 30 *PHYLON* 375 (1969). However, the schools re-segregated over time.

In 1947, New York State enacted a law prohibiting segregation in the public schools. N.Y. EDUC. LAW § 3201 (McKinney 1970). Both the New York State Department of Education and the State Board of Regents issued mandates requiring the integration of the public schools. U.S. COMM. ON CIVIL RIGHTS, CIVIL RIGHTS USA: BUFFALO 40 (1963); *Nyquist I*, 415 F. Supp. at 949-50. Relying on these mandates, in 1965, several black parents appealed to the state Commissioner of Education, charging that the Buffalo Public School System ("BPSS") was racially imbalanced (particularly in the elementary schools); that the Board of Education ("Board") refused to alleviate this racial imbalance; and that the BPSS discriminated in the recruitment and placement of black teachers. Yerby Dixon Appeal, 4 EDUC. DEP'T REP. 115, 116 (1965). Although the Commissioner held for plaintiffs on the first two claims, and ordered the desegre-

Buffalo school system had 61,000 students, 45.8% of whom were black, Latino, Asian or Native American.¹² Out of seventy-seven elementary schools, fifty-five were segregated; that is, they were over eighty percent minority or majority. Similarly, five of the six middle schools, and seven of the thirteen high schools were segregated.¹³

On April 30, 1976, Judge Curtin found that "the Board of Education, the Superintendent of Schools, the Common Council, the Commissioner of Education and the Board of Regents intentionally created and maintained, in substantial part, the segregation in the BPSS."¹⁴ He found that whenever natural integration appeared to be developing within the school system, the Board acted in ways to hamper that effect. For example, BPSS allowed white students to go to schools outside of their regular attendance zone when their "home" school was predominantly black, for many spurious reasons, including "fear of black children."¹⁵ Similar transfers were granted to any student who expressed a wish to study the Polish language, a language which was only taught in certain predominantly white schools.¹⁶ BPSS created "optional zones," which allowed all students, black or white, to attend a school outside of their normal attendance zone. However, because the population in these

gation of the Buffalo school system, *id.* at 116-19, little was done by the BPSS to remedy the unlawful situation. *Nyquist I*, 415 F. Supp. at 957.

In 1966, the BPSS created a voluntary integration program, Quality Integrated Education ("QIE"), and started the one-way busing of some black junior-high school students into predominantly white peripheral schools. Hochfield Tr., *supra* note 11, at 51. The Board also stated at that time that white students would not be bused into black neighborhoods. *Nyquist I*, 415 F. Supp. at 952. By 1968, 2000 black students — out of a total minority school-age population of approximately 27,000 — were being bused from the inner-city to predominantly white peripheral schools. *Id.* at 953. This step, however, was insufficient to provide a serious remedy. Any desegregative effect was essentially nullified by the Board, which allowed some 2,000-4,000 white students to transfer from integrated schools to predominantly or all white schools to avoid integration. *Id.* at 960.

In 1972, seven years after the State Commissioner of Education had ordered the BPSS to integrate, he noted that Buffalo was more segregated than ever. Of a total of 96 schools, over 20 were more than 90% black and 29 were more than 90% white. *Id.* at 956. The Board appeared intransigent with regard to the state mandate. When, in 1972, the Commissioner asked the Board to develop a revised desegregation plan within two months, the Board informed the Commissioner that it was unable to do so. *Id.* And when, in 1973, the Commissioner sent a state task force into Buffalo to develop the plan for the city, the Board rejected those plans. *Id.* at 957.

12. *Nyquist I*, 415 F. Supp. at 915.

13. *Id.* at 916.

14. *Id.* at 960. While the city defendants were found guilty of actively creating and maintaining segregated schools, the state defendants were found guilty of failing to take steps to eliminate the desegregation. *Id.* at 958-59, 961. In 1978, liability was affirmed as to the city defendants, but reversed as to the state defendants. See *supra* note 1. This ruling was made in light of the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), which required proof of segregative intent for liability for a constitutional violation. *Nyquist I*, 573 F.2d at 146.

15. *Nyquist I*, 415 F. Supp. at 936-39.

16. *Id.* at 926. The head of the Pupil-Personnel Department of the BPSS, Anthony Gerard, stated at a deposition that the white students would line up in his office in August for language transfers as if they were in a supermarket. Hochfield Tr., *supra* note 11, at 30-31.

"optional zones" was predominantly white, the effect was to allow white students to avoid going to school with black students in what would otherwise have been an integrated school.¹⁷ It also sited and re-districted schools to create and maintain segregated schools.¹⁸

Once liability was established, Judge Curtin moved to the remedy phase of the case. In June 1976, he conducted eight days of hearings about the desegregation plans proposed by the Board and by plaintiffs. He granted motions to intervene to a group representing latino students in the BPSS, to a member of the Common Council who presented an alternative desegregation plan, and to the Buffalo Teachers' Federation. He also received submissions from parents and others in the community, which he made available to all interested parties.¹⁹

On July 9, 1976, Judge Curtin met with the parties to discuss the weaknesses in their respective proposed plans for desegregation, and to let the parties know how he viewed the remedy phase.²⁰ He set as his goals the elimination of racially identifiable schools²¹ and the integration of the staff.²² Each school should reflect the majority-minority ratio for all schools in the school district.²³ School staff should be integrated immediately, and a plan for minority recruitment developed.²⁴ Judge Curtin pointed out that to eliminate racially identifiable schools, a successful plan would have to include busing,²⁵ but cautioned the parties that the burden of busing should be equalized between minority and majority students.²⁶ Plans based on open enrollment or freedom-of-choice could not be used.²⁷ Judge Curtin provided an important indication of the timing of the process when he stated that "in some ways we can go forward and in some ways we ought to wait a little bit."²⁸ With respect to the realities of the desegregation process, Curtin pointed out that although he could not consider the threat of white flight, he could consider record evi-

17. *Nyquist I*, 415 F. Supp. at 939-41.

18. *Id.* at 924, 930-36.

19. Proceedings, *supra* note 2, at 14-15.

20. By the time Judge Curtin started the remedial process, the Supreme Court had already created parameters for remedies in school desegregation cases. In *Swann v. Board of Educ.*, 402 U.S. 1, 23-25 (1971), the Court authorized the use of mathematical racial balance requirements as a starting point to shape a remedy. It also authorized the use of remedial alteration of school zones and busing as acceptable remedies. *Id.* at 27-29. The Court's ruling that federal courts may not impose a multi-district remedy for a single district *de jure* segregation problem, *Milliken v. Bradley*, 418 U.S. 717, 718 (1974), meant that Judge Curtin would not be able to pull the Buffalo suburbs into the remedy process.

21. Proceedings, *supra* note 2, at 17.

22. *Id.* at 63-64.

23. *Id.* at 54.

24. *Id.* at 64.

25. *Id.* at 19.

26. *Id.* at 62.

27. *Id.* at 20.

28. *Id.* at 7. Indeed, the slow pace of the desegregation process would bring plaintiffs into court more than once. See *supra* note 1.

dence that re-segregation was likely to occur under a proposed plan.²⁹

The main thrust of defendant Board's plan ("Buffalo Plan Phase I") was to close the all-black academic high school and to move those students out into the predominantly white academic high schools, thereby integrating the white schools. Ten other schools were to be closed and their students moved to different schools as a way of increasing desegregation. Two magnet schools were to be created within the black community. The hope was that these specialized schools would have such outstanding programs that white parents would voluntarily request that their children be bused into the black community to attend them.³⁰

The court faulted the Board's plan because it would not effectively integrate the BPSS. Its main impact would be felt at the high school level and would have little or no impact at the junior high or elementary levels.³¹ Under this proposed plan, the number of white children in racially isolated schools would drop twenty percent, while the number of minority children in racially isolated schools would drop only 5.7%.³² The Board was ordered to devise a plan that integrated the BPSS to the greatest extent possible.³³ If its proposal did not fully desegregate the system, defendant school board was obligated to present hard evidence to explain why it could not meet this mandate.³⁴

Having laid out guidelines for the remedy, Judge Curtin set forth an important theme for the viability of any proposed plan — the support of the community. In his view, no plan would work if it could not garner the long-term support of the community.³⁵ A major criticism of the plans before the court, therefore, was the absence of community input.³⁶ Judge Curtin explicitly instructed the Board how to get such support. It was to solicit the views of parents, teachers and community leaders in each school district at each step of the planning process to get their ideas for the changes they would like to see in their schools and how these changes should be implemented.³⁷ The Board had a responsibility to listen to the common sense, practical views of parents and teachers.³⁸ The court also directed the Board to ask for resources and support from colleges and universities in the area, as well as from area business and labor leaders, the local bar association, and other community leaders.³⁹ The judge also made it clear that the ideas of parents in the black community would have to be heard and considered before there could be a

29. Proceedings, *supra* note 2, at 20-21.

30. Rossell, *supra* note 5, at 329; *Nyquist VI*, 566 F. Supp. at 513; interview with Marilyn Hochfield, Attorney for plaintiffs, in Buffalo (Nov. 13, 1988) [hereinafter Hochfield Interview].

31. Proceedings, *supra* note 2, at 21-22.

32. *Id.* at 22.

33. *Id.* at 56.

34. *Id.* at 20.

35. *Id.* at 16.

36. *Id.* at 36, 38.

37. *Id.* at 53-54, 58.

38. *Id.* at 74-75.

39. *Id.* at 68-69.

final ruling on the acceptability of any plan.⁴⁰ He pointed out that the community itself had an obligation to make its views known and to participate in the construction of an integrated school system.⁴¹

Finally, noting the problem of monitoring compliance with the court orders, the judge emphasized that "this court is not and does not want to be a school administrator."⁴² He asked the parties to suggest an appropriate person to act as master during the remedy phase.⁴³ He also requested suggestions for community representatives from each school who could act as monitors.⁴⁴ Judge Curtin concluded by saying that Buffalo could have one of the finest school systems in the nation, "but it must first believe that it can."⁴⁵ He urged the community to take hold of that belief and come with him, as friends, "to seek a new world."⁴⁶

Despite Judge Curtin's concern that the Board's plan (Phase I) did not go far enough in desegregating the entire system, he allowed the BPSS to implement Phase I in September 1976, while it developed a more complete desegregation plan to begin the next year.⁴⁷ This first phase of court-ordered desegregation went smoothly.⁴⁸ Members of the religious community — ministers, priests, rabbis — rode the school buses the first days of desegregation to ensure a peaceful transition.⁴⁹ Following the judge's order, the school superintendent, Eugene Reville, sent teams to hundreds of meetings within the various Buffalo communities to solicit their ideas for developing a system-wide desegregation order.⁵⁰ Reville personally attended many such meetings to dis-

40. *Id.* at 39.

41. *Id.* at 74-75.

42. *Id.* at 10.

43. *Id.* at 59-60.

44. *Id.* at 67. In 1977, Curtin appointed a Citizens' Committee on School Desegregation. Its tasks included gathering information on desegregation and bringing it to the attention of responsible parties; facilitating citizen participation in the desegregation process; fostering public awareness of desegregation; and encouraging cooperative efforts with local colleges, cultural groups and the university. *Nyquist I*, No. 1972-325 (W.D.N.Y. Sept. 29, 1977) (order appointing Citizen Commission to monitor implementation of desegregation). In 1979 he disbanded that committee. *Nyquist II*, No. 1972-325 (W.D.N.Y. Nov. 21, 1979) (vacating order that established Citizens Commission). Since that time, Carol Streiff, a para-legal working part-time for plaintiffs, has been monitoring the process. Address by Attorney David Jay, seminar lecture at SUNY Law School at 23 (1987) [hereinafter Jay Tr.].

45. Proceedings, *supra* note 2, at 77.

46. *Id.* at 77-78.

47. Address by Honorable John Curtin, seminar lecture at Law School at State Univ. of N.Y. at Buffalo at 10 (1987) [hereinafter Curtin Tr. 1987].

48. Hochfield recalls only one racial incident during the entire desegregation process. That incident took place several weeks after the beginning of Phase I. White students milled around outside their newly integrated high school, refusing to go inside, and threatening black students who were being escorted into the school. The situation calmed down after a few days. Hochfield Interview, *supra* note 30. There were undoubtedly other minor instances of hostility which did not get the attention of the principal actors in this case.

49. R. Brooks, Influences of Buffalo Ministries on Integration 11-12 (1988) (unpublished seminar paper).

50. Reville Tr., *supra* note 7, at 26-27.

cuss the desegregation order and plans for the future of the schools.⁵¹ Judge Curtin was also intimately involved in the desegregation process. For six years, he met with representatives of the parties at least once a week to ensure that the planning process was proceeding along the lines he had set.⁵² The judge also let the community know that his office would be open to receive individual complaints about the desegregation process, complaints which he would ask the BPSS to resolve.⁵³

In May 1977, the court approved Buffalo Plan Phase II, which was filed by the Board in response to the court's direction to develop a more comprehensive plan for desegregation.⁵⁴ This plan contemplated the expansion of the Quality Integrated Education ("QIE") program, created in 1966. Through this new program, black parents could request that their children be bused out of the inner-city, predominantly black schools to predominantly white schools on the periphery of the city. Under this expanded QIE plan, each white school would ultimately have a twenty percent minority population.⁵⁵ Also, under Phase II, four more schools were closed, and more magnet schools were created in the black community.⁵⁶ The black students who were displaced when their neighborhood school was converted to a magnet were either transferred to another school in the neighborhood, kept on at the magnet, or transferred to a white school through the QIE program.⁵⁷ To the plaintiffs, this plan seemed unfair. Only minority children had to move from their neighborhood schools to get an integrated education.⁵⁸ Further, over forty percent of the black students enrolled in the QIE program made that "choice" because they no longer had a neighborhood school to attend.⁵⁹

On June 29, 1978, the court asked the parties to submit proposed findings in response to the Supreme Court's mandate in *Dayton Board of Education v. Brinkman*⁶⁰ that the courts decide whether the segregative acts of the Board "had a sufficiently widespread impact on the school system so as to justify the

51. *Id.*

52. Curtin Tr. 1987, *supra* note 47, at 13-14; *Nyquist V*, 547 F. Supp. at 469 n.1. These meetings were informal ones, not on-the-record hearings in court. Curtin Tr. 1987, *supra* note 47, at 13-14.

53. Curtin Tr. 1987, *supra* note 47, at 21.

54. The court also directed the Board to prepare an explanation of the changes for each school affected by the order, and to distribute that explanation to the parents of each child in that school. *Nyquist I*, No. 1972-325 (W.D.N.Y. May 4, 1977). He also required that each notice state that "concerned parents may bring their objections to the court by filing a written application to intervene." *Id.* at 11.

55. *Nyquist V*, 547 F. Supp. at 470. The number of minority students enrolled in the QIE program in the first year of Phase II was approximately 3,000, up from 1,684 the previous year. Rossell, *supra* note 5, at 339.

56. *Nyquist V*, 547 F. Supp. at 470.

57. *Nyquist II*, 473 F. Supp. at 840.

58. *Id.* at 840.

59. *Id.* at 840-47.

60. 433 U.S. 406 (1977).

imposition of a system-wide remedy.”⁶¹ On June 6, 1979, Judge Curtin held that the scope of the remedy in Buffalo must be system-wide and ordered all of the schools in the BPSS to be desegregated no later than the fall of 1980.⁶² Judge Curtin noted that only a partial remedy was in place through the QIE program and the magnets, leaving fifteen all-minority schools.⁶³ Because the QIE program was burdensome on black children, the victims of a constitutional wrong, and because it was unmanageable and inefficient, Judge Curtin ordered that the QIE program be discontinued as soon as possible.⁶⁴ Judge Curtin also stated at this time that since the Buffalo school system was approximately fifty percent majority and fifty percent minority, he would consider a school with a minority population between twenty-five percent and sixty-five percent to be desegregated.⁶⁵

On November 15, 1979, the Board filed Buffalo Plan Phase III, which drastically scaled-down the QIE program, created four new magnet schools and closed ten more schools.⁶⁶ Its most important innovation was the creation of six Early Childhood Centers for pre-kindergarten through second grade.⁶⁷ For two of these Centers, assignment was mandatory.⁶⁸ For the other four,

61. *Nyquist II*, 473 F. Supp. at 832.

In Judge Curtin's order of March 24, 1979, the court addressed its concern that the Board had taken inadequate steps to recruit minority teachers, principals and support staff as ordered in 1976. As a result, the court imposed a "one-for-one hiring goal on the Board, to be continued until the ratio of minority to majority personnel reflected the same ratio as in the general community." *Nyquist IV*, 520 F. Supp. at 963. In September of 1979, the Buffalo Teachers' Federation argued that the Board of Education violated state law by hiring teachers on a one-for-one basis pursuant to the court order. *Id.* The court disagreed, stating that "neither state law nor contract law [could] be used as a defense when the result would be to impede a court-ordered remedy for constitutional violations." *Id.* Thus, the court ordered the Board to continue until it met a goal of 21% minority teachers and staff. *Id.* at 965-66. The Second Circuit upheld the one-for-one hiring goal. *Nyquist IV*, 712 F.2d at 822-24. In 1981, unions representing various professional and non-professional employees of BPSS were granted leave to intervene. *See Nyquist IV*, No. 1972-325C (W.D.N.Y. March 12, 1982) (order granting motion to intervene by Buffalo Building Council); *Nyquist IV*, No. 1972-325 (W.D.N.Y. June 17, 1982) (order granting motions to intervene by various unions and the Buffalo Council of Supervisors and Administrators). In April 1987 the intervenor representing disabled pupils in the BPSS asked the district court to ease the one-for-one hiring order to allow white teachers to enter the tenure track. At the same time, plaintiffs asked the court to order the Board to step up recruitment in order to achieve its 21% goal. Buffalo News, Apr. 28, 1987, at B5, col. 5.

62. *Nyquist II*, 473 F. Supp. at 849-50. Judge Curtin found that the majority of Buffalo schools were affected by defendant's acts. Many of the discriminatory policies, such as discriminatory staff assignments, were applied on a system-wide basis. Even those acts which were confined to a limited number of schools had an indirect effect on other schools, since changes in one part of the system affected the rest of the system. *Id.* at 833. For example, discriminatory transfers in the primary grades had extensive ramifications due to the feeder patterns to junior and senior high schools. *Id.*

63. *Id.* at 835.

64. *Id.* at 840, 846-47.

65. *Id.* at 848. On June 19, 1980, this guideline was changed to 30-65% minority students for each elementary school. Each magnet school, however, was required to have a student population which was 50% minority and 50% majority. *Nyquist VI*, 566 F. Supp. at 514.

66. Rossell, *supra* note 5, at 339.

67. *Id.* at 340.

68. *Id.*

there were no fixed assignments.⁶⁹ Thus, at this phase, increased integration would be achieved in part by fixed assignments and cross-busing. The court approved Phase III in June and August 1980.⁷⁰

Plaintiffs appealed the court's approval of this plan to the Second Circuit, arguing that the district court had once again approved a constitutionally deficient freedom-of-choice plan which did not accomplish system-wide desegregation.⁷¹ On January 5, 1981, the Second Circuit remanded for more comprehensive findings, stating that it could not tell whether the Board had discharged its burden of coming forth with a plan that met constitutional standards.⁷² It also noted that this case had "dragged on too long."⁷³ In response to this concern, on January 27, 1981, the Board proposed an expedited Phase III ("Phase IIIx") which would impose more fixed assignments as of September 1981, if voluntary measures had not achieved system-wide desegregation by that time. The Board requested, however, that it be allowed to wait until September 1982 to implement Phase IIIx.⁷⁴

On May 19, 1981, Judge Curtin refused the request for a delay, and held that since the Board seemed to have achieved the maximum success possible by voluntary means,⁷⁵ it was time for involuntary desegregation. He then ordered the Board to implement fixed assignments as of September 1981⁷⁶ in order to achieve complete system-wide desegregation in conformity with the dictates of *Dayton*, which required a system-wide remedy.⁷⁷ Further, the desegregation was to conform with the standards laid out in *Green v. County School Board*,⁷⁸ which held freedom-of-choice plans unacceptable if there were "reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system"⁷⁹ Despite concerns in the community, the opening day of school was calm.⁸⁰ Phase IIIx continued the generally peaceful desegregation process of previous years.⁸¹

Plaintiffs have returned to court many times since the implementation of Phase IIIx in 1981 to raise issues concerning that implementation. One of their major concerns has been the development of magnet schools, and how they affect racial imbalance in the entire system, as well as the quality of edu-

69. *Id.*

70. *See Nyquist III*, 514 F. Supp. at 1134.

71. *Nyquist III*, 636 F.2d at 906.

72. *Id.*

73. *Id.*

74. *Nyquist III*, 514 F. Supp. at 1135-36.

75. *Id.* at 1139.

76. *Id.* at 1141.

77. 433 U.S. 406 (1976).

78. 391 U.S. 430 (1968).

79. *Nyquist III*, 514 F. Supp. at 1137 (quoting *Green*, 391 U.S. at 440-41).

80. Reville, *Desegregation as a Tool for Establishing Quality Education*, in *BROWN PLUS THIRTY: PERSPECTIVES ON DESEGREGATION*, 63-64 (L.P. Miller ed. 1986).

81. *Id.* at 64; *see also* Address by Frank Mesiah, seminar lecture at Sociology Dept. at State Univ. of N.Y. at Buffalo at 43 (1988) [hereinafter Mesiah Tr. 1988].

cation in the non-magnet schools and programs.⁸²

The Board, too, has gone before the court during this process, to request adequate funding for the integration program. Buffalo's school system is dependent on the Mayor and the Common Council for funding. On occasion, they have refused to provide the Board with the full funding it requested. In both 1981 and 1982, the Board asked Judge Curtin to order the City of Buffalo to provide more funds to carry out his desegregation mandate. After a hearing, Judge Curtin so ordered.⁸³

In 1984, as negotiations between the City and the Board for 1983-84 funding continued, Judge Curtin appointed a citizens' committee to negotiate a budget with the city and the Board.⁸⁴ When this committee was unable to resolve the dispute, the judge appointed the Honorable Edmund F. Maxwell, United States Magistrate, to serve as special master to hear the Board motions on the 1983-84 and 1984-85 budgets.⁸⁵ Magistrate Maxwell held fifty days of hearings.⁸⁶ On May 16, 1985, he filed his report with the court, recommending that the Board be granted the amount it had requested for the 1983-84 school year.⁸⁷ Judge Curtin adopted the magistrate's findings and recommendations on August 26, 1985.⁸⁸ On June 22, 1988, the Board voted once again to sue the Mayor and Common Council for an additional \$15 million for the 1988-89 school year.⁸⁹

In 1988, in a system with seventy-seven schools, only four of them were still more than sixty-five percent minority, and thus, not within the guidelines prescribed by the court for an integrated school.⁹⁰ The magnet programs have been successful in attracting parent interest.⁹¹ In 1987, there were over 12,000

82. See, e.g., *Nyquist VII*, No. 1972-325C (W.D.N.Y. Jan. 6, 1986) (plaintiffs move to enjoin the creation of two magnet high schools).

83. *Nyquist V*, 547 F. Supp. at 468-69, 474-77, 484. The City appealed the 1982 order to the Second Circuit, which affirmed the lower court ruling. *Nyquist V*, 712 F.2d at 811. The Second Circuit also noted "an unusual aspect of the case," which came when counsel for the NAACP declined to defend the district court order to give additional funds to the Board, although he had signed plaintiffs' brief urging affirmance of the order. It was his view that the district court had not made sufficiently detailed findings to show that the entire amount of \$7.4 million was needed to carry out its desegregation mandate. He decried the fact that school boards around the country were requesting more money ostensibly for desegregation, yet used the money to meet their own unmet education needs, when such demands incurred the wrath of the local communities. The Second Circuit noted that this concern probably reflected the institutional concern of the national NAACP more than it did the litigating position of plaintiff students. *Id.* at 812-13.

84. *Nyquist VI*, No. 1972-325C (W.D.N.Y. April 10, 1984) (order appointing a Budget Review Committee).

85. *Nyquist VII*, 618 F. Supp. at 806.

86. *Id.* at 808.

87. *Id.* at 809.

88. *Id.* at 811.

89. Buffalo News, June 23, 1988, at A1, col. 4.

90. Reville Tr., *supra* note 7, at 3. This number has been challenged by plaintiffs as being too low and based on a faulty analysis. See *infra* note 200 and accompanying text.

91. Students are admitted to most magnet schools through a lottery system. Once a year names are drawn from two drums — one for white students and one for minority students. The

applicants for 2,500 spaces.⁹² Before the integration process began, Buffalo was ranked lowest among the five largest cities in New York State in reading and mathematics test scores.⁹³ In 1988, Buffalo ranked first out of the five.⁹⁴ Within the past five years, fifteen of Buffalo's schools have been selected by the State Commissioner of Education as "Schools of Excellence," more than any other school district in the state, including New York City.⁹⁵ Five of Buffalo's schools have won the national Secretary of Education awards. Four of those were awarded in one year, more than were awarded any school system in the country. Of those four, only one was a magnet school.⁹⁶

On March 26, 1987, the Board discussed whether it should petition the court to declare the school system fully integrated, and to relinquish its jurisdiction over the case. In a five-to-three decision, the Board decided not to so petition the court.⁹⁷ Thus, *Arthur v. Nyquist*, which was filed in 1972 and decided in 1976, is still under the jurisdiction of the court.

II.

THE ROLE OF THE JUDGE IN DESEGREGATING AND INTEGRATING THE BUFFALO SCHOOLS

At the core of structural reform is the judge and his effort to give meaning to our public values.⁹⁸

Before the desegregation of the Buffalo school system began, the general view in Buffalo was that the city would fail in its attempt to desegregate peacefully.⁹⁹ There were predictions that Buffalo, a "hard-nosed, blue collar" town,¹⁰⁰ would react to court-ordered desegregation as violently as Boston had reacted to the same order only two years earlier.¹⁰¹ The brutality with which Bostonians fought desegregation was witnessed by television audiences around the nation.¹⁰² Many people expected to witness the same in Buffalo, a

first names drawn are accepted in the special school. Because the student population in Buffalo is approximately 50% white and 50% minority, the drawing continues until the racial balance is achieved. In 1987, minority students constituted 55.6% of the total magnet school enrollment of 13,965. Buffalo News, Feb. 21, 1987, at C5, col. 2.

92. Renville Tr., *supra* note 7, at 29.

93. Buffalo News, Mar. 20, 1988, at B1, col. 1.

94. *Id.*

95. Telephone interview with Joseph Murray, Associate Superintendent of the BPSS (Dec. 28, 1988).

96. Buffalo News, June 30, 1986, at A1, col. 2.

97. *Id.*, Mar. 26, 1987 at B1, col. 2.

98. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979).

99. Renville Tr., *supra* note 7, at 25.

100. Curtin Tr. 1987, *supra* note 47, at 15.

101. Renville Tr., *supra* note 7, at 25.

102. In September and October 1974, the first year of court-ordered desegregation in Boston, school buses were stoned, one black bus driver was beaten, and the Ku Klux Klan marched. J. ROSS & W. BERG, "I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER": THE BOSTON SCHOOL DESEGREGATION CONTROVERSY 196, 204-208 (1981). There were beatings, fights and vandalism throughout the city. *Id.* at 245. In South Boston High School, sev-

city which, with its large working-class Irish, Italian and black neighborhoods, all in well-defined ethnic communities, bore a striking resemblance to Boston. But Buffalo did not explode into violence when the desegregation process began. There was no community-wide refusal to obey the court order. The question addressed in this section is, "how did Buffalo avoid the violence of Boston?"

The success of Buffalo's desegregation effort can in large part be attributed to the role Judge Curtin played in shaping and managing the reform of the Buffalo school system after issuing the liability decision. Institutional reform cases, which are exemplified by cases requiring the desegregation of schools or the restructuring of prison systems, require judges to establish ongoing supervisory relationships with the targeted institutions. Not only must the judges decide if a constitutional right has been violated, but they must also monitor the shaping of the remedy to ensure that the institution is reformed in a manner consonant with constitutional values. Unlike traditional cases, where the judge's decree terminates her involvement in the case, in structural reform cases, the decree prolongs and deepens the court's involvement in the case.¹⁰³ Thus, in Buffalo, after deciding that the schools had been segregated in violation of the Constitution, Judge Curtin had to plan and monitor a remedial process to ensure that the unconstitutional school segregation was eliminated in the most efficacious and appropriate manner. This would involve him in the remedy phase for over twelve years.

There are three areas where Judge Curtin's actions were crucial to the successful desegregation and integration of the school system: (1) initial planning of the desegregation process; (2) setting the pace for desegregation; and (3) monitoring the process of reforming the school system.

eral major fights occurred. In one case, a youth had to be hospitalized. *Id.* at 225. Racial slurs were painted on buildings. Black students were "greeted" with chants and jeers, and bottles were thrown at them. In one instance, when whites stoned buses taking black elementary students home, eight of the students were injured. *Id.* at 197-98. In another incident, a crowd of white protesters gathered near a local school and waited for school buses to drive by so that they could jeer and chant at them. *Id.* at 231. While the crowd waited, a car driven by a black man drove by. The crowd forced the man to stop, pulled him from his car and beat him severely. *Id.* at 232. On October 15th, a white student was stabbed during a fight between black and white students. *Id.* at 257. That same day, the Governor mobilized the National Guard. *Id.* at 260. Violence continued. In December 1974, there were fights at South Boston High, which escalated into fighting between police and residents of South Boston. Fourteen police were injured. *Id.* at 318.

In July and August 1975, the second year of desegregation, racial incidents proliferated. *Id.* at 570. In the fall of 1979, a black football player was shot while playing a game in a white section of the city. *Id.* at 673. This attack was followed by walk-outs and protests at several schools and sporadic violence throughout the city. *Id.* These spates of violence and resistance occurring five years after the 1974 decision to desegregate "suggest that the potential for racial violence and political discontent [in Boston] was still quite high." *Id.* at 673-74.

103. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1280, 1296-98 (1976).

A. Initial Planning

Judge Curtin sent two unambiguous messages to the Buffalo community. The first message was that the schools must be desegregated: this was required by the Constitution. The second message was that the success of desegregation rested upon the involvement of the entire community. Pointing out, "we're all in the same ship,"¹⁰⁴ the judge tried to persuade the citizens of Buffalo to view the court order not as something mandatory with which they must comply, but rather as an opportunity to build better schools and a better community.

Although Judge Curtin eschewed any role for himself as a "school administrator," he did note that he had visited many of the schools in an effort to prepare himself for the remedy phase. Further, the judge alerted the public that his office would be open to receive complaints about the desegregation process.¹⁰⁵ He thus indicated that he was not setting himself apart from the community which was going to be required to change in order to comply with his order. He would be intimately involved in that process.

Judge Curtin's exhortation to the Board to enlist the support of all aspects of the community to plan the desegregation process — minority and majority, professionals and parent groups — emphasized his theme that different groups in the community should work together. In other words, Judge Curtin set out to build community through the process of desegregation.¹⁰⁶ He stated:

[T]his is a democracy where the best decisions are the ones in which individual members of the community have the ability to . . . have their views listened to and considered and considered seriously. That is why I believe the community participation in the planning stage is so important. . . . I believe the Board and the Commissioner's staff and the Court have a responsibility to listen to the common sense practical views of the parents and the teachers and other people who are involved in this very complicated process They have insights which we cannot know about until we listen, and it is not only within the spirit of the law, but it is in the spirit of the United States as a democracy to listen to the views of all individuals in the community. . . . I have directed that that be done, and I insist that that shall be done. . . .¹⁰⁷

There are several reasons why Judge Curtin proceeded in this fashion.

104. Curtin Tr. 1987, *supra* note 47, at 23.

105. *Id.* at 21.

106. Cf. Lukas, *Beyond Yonkers: Cracking Gilded Ghettos*, N.Y. Times, Aug. 24, 1988, at A25, col. 2 (describing the situation in Yonkers, N.Y. where the judge imposed crippling financial sanctions on both the city and city council members after their two year refusal to vote for medium-income public housing after a finding of constitutional violation: "Yonkers reached this impasse because its politicians failed to wrench community out of diversity").

107. Proceedings, *supra* note 2, at 73-74.

First, this model fits his notion of how to get people to do what you want them to do. In his view, "... the more you have to do things by orders, of course, the more difficult it becomes. So you try to accomplish it by cooperation."¹⁰⁸ Keeping people talking to each other is an important element of this process. As Judge Curtin noted later: "... [I]n any ... community, you are going to have people who agree wholeheartedly and ... people on the other side who are going to disagree. But we were able to talk it all out, to keep talking about it, to try to work out a practical solution to the problem."¹⁰⁹ Sending the Board into the community to discuss desegregation was also important because it gave those who were angry about the desegregation a chance to vent their anger in a relatively controlled setting.¹¹⁰ In addition, it is likely that Judge Curtin recognized that his community participation model would induce the city's elites to assume leadership roles in the desegregation process. As Hochfield noted, there were other cities, such as Columbus, Ohio, where the mayor exercised leadership on the desegregation issues, and set a positive tone for the compliance process. This kind of leadership from the executive branch was not forthcoming in Buffalo. "The judge ... tried to poke people to provide it," Hochfield stated. "We all did."¹¹¹

B. *Setting the Pace*

Another message the judge sent in the early planning stages concerned the timing of the pace of desegregation. At the initial meeting with the parties on the acceptability of their respective desegregation plans, he stated, "we are at a particular point in our journey and ... in some ways we can go forward and in some ways we ought to wait a little bit."¹¹² To the extent that the judge was indicating that he would not order complete integration immediately, he was using timing as a tool to elicit successful compliance with his order to desegregate. Judge Curtin later stated that he knew that the first desegregation plan (Phase I) was so limited in scope that it could not "pass muster" if appealed. He felt, however, that approval of the plan was appropriate since he had a promise of a better plan from BPSS for the next year.¹¹³ The judge thought it important to get some kind of remedy in place right away, even though it was not the "perfect" remedy. "If you wait for the perfect remedy,"

108. Curtin Tr. 1987, *supra* note 47, at 4.

109. *Id.*

110. Address by Honorable John Curtin, seminar lecture at Sociology Dept. at SUNY at 24 (Feb. 17, 1988) [hereinafter Curtin Tr. 1988].

111. Hochfield Tr., *supra* note 11, at 44. The U.S. Civil Rights Commission has suggested that desegregation in Boston was hampered by "virtually a total lack of public and private leadership," as well as the fact that the judge initially made no effort to involve communities affected by the order in working on the process. U.S. COMMISSION ON CIVIL RIGHTS, FILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION IN THE NATION'S PUBLIC SCHOOLS 18, 20 (1976). It was only in the second year of court-ordered desegregation that the court made an effort to involve the affected communities and local leaders in the process. *Id.* at 21.

112. Proceedings, *supra* note 2, at 7.

113. Curtin Tr. 1987, *supra* note 47, at 10.

he stated, "you might have to wait eight, ten years in the future. . . ." ¹¹⁴

In the ensuing months and years, as plaintiffs became more and more aggravated by the slow pace of desegregation, the judge "kept his fingers crossed" that an appellate court would not force him to order immediate system-wide integration. As he later remarked: "I knew . . . we couldn't do it the first year or the second year; I knew it would take time."¹¹⁵ Judge Curtin was convinced that if the desegregation process moved too quickly it would fall apart.¹¹⁶ It is Curtin's view that one of the worst things a judge can do is to give an order that cannot be obeyed for practical reasons.¹¹⁷ In Buffalo's case, he thought that the Board would need time to deal with practical issues such as creating a busing program, arranging lunch programs and moving school equipment.¹¹⁸ Curtin also thought that it would take time to explain to the community what was going to be done and time to allay the fears of both white and black parents about issues such as transportation and the safety of their children.¹¹⁹ A slow desegregation process allowed for some parents who were newly involved in desegregation to become comfortable with the changes in the schools and to tell their friends that the new system was working well.¹²⁰

The message Judge Curtin sent to the community, therefore, was that the schools would be integrated, but not necessarily immediately. Although plaintiffs viewed this as a travesty of the Supreme Court's mandate that school boards come forward with a plan "that promises realistically to work *now*,"¹²¹ in Curtin's view, the slow, piecemeal approach was necessary to achieve the ultimate goal of peaceful and complete integration.

It has been suggested that a court order, such as Judge Curtin's, is more easily accepted within a community to the extent that the order enforces socially accepted norms.¹²² Curtin's control of the pace of desegregation is an example of this and helps explain why desegregation was largely peaceful in Buffalo. Curtin's court orders gave the Buffalo community a chance to adjust slowly to a new norm of racially integrated schooling. The specific instances of desegregation efforts in Buffalo illustrate this theory.

114. *Id.* at 14.

115. Curtin Tr. 1988, *supra* note 110, at 43-44.

116. *Id.*

117. Curtin Tr. 1987, *supra* note 47, at 10.

118. *Id.* at 11-12.

119. Curtin Tr. 1988, *supra* note 110, at 13.

120. *Id.* at 43.

121. *Green v. County School Board*, 391 U.S. at 439 (emphasis in original).

122. H. RODGERS & C. BULLOCK, *COERCION TO COMPLIANCE* 6-7 (1976). I have found it helpful to think about that data in terms of variables which play a role in determining whether there will be compliance with a law or court decision. See generally *id.* at 1-7, 123-30. These factors include the responses of the elite to the law; the substance of the law (will it be considered a benefit or a burden? how extensive is the expected change?); the social and political characteristics of those affected (does the law enforce socially accepted norms?); the nature of the decision-makers (do they agree with the law?); and the quality of enforcement (are the sanctions clear? are they severe?).

Before the liability decision in 1976, there was already some integration within the school system — small-scale, one-way busing of black school children from the inner-city to peripheral white schools under the voluntary “QIE” program. The first step of court-ordered desegregation, Phase I, did not demand marked social change beyond the QIE program. Under Phase I, black students were moved from the black academic high school to white high schools and two magnet schools were created in the black community to attract white volunteers. Since Phase I required the white community to accept not much more than what it had already come to accept under the pre-decision desegregation plan, perhaps the court order to implement Phase I was in fact an order to enforce a socially acceptable norm.

Although Phase II in 1977 and Phase III in 1980 did not propose complete system-wide desegregation, they did mark further steps towards system-wide desegregation which were proposed by the Board and accepted by the Judge. It was not until 1981, when the Second Circuit noted its concern about the slow pace of desegregation in Buffalo,¹²³ that the Board implemented “fixed assignments,” that is, the forced busing of white school children to black neighborhoods as a means of achieving system-wide desegregation of the city’s schools.¹²⁴

Thus, at each step of the way, the white community had an opportunity to acclimate itself to an increased level of integration within the school system. When forced busing became a reality, five years after the initial order to desegregate, that order probably did enforce a socially acceptable norm. On the other hand, had the order been issued five years earlier, it is likely that it would not have enforced a socially acceptable norm, and the community would have shown greater resistance. Controlling the pace of desegregation also controlled the amount of normative change that was expected and thus, allowed the incremental change of the normative behavior of the white community.¹²⁵

C. Monitoring the Reform Process

There are many methods a court might use to monitor the remedy pro-

123. *Nyquist III*, 636 F.2d at 906.

124. Reville, *supra* note 80, at 63.

125. Cf. Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 LAW AND POLICY 355, 376 (1987): “While there is indeed order in the social world — order conceived in culture and realized in the interlinked structures of behavior — it is contingent order, subject to reconception and restructuring through purposive political interaction.”

In Boston, Judge Garrity decided the liability issue on June 21, 1974. SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS 98 (1984). In September of the same year, out of a student population of 94,000, 45,000 students were transferred to other schools, 18,235 of them by bus. *Id.* at 100. By the next year, the number of students bused increased to 20,447. J. ROSS & W. BERG, *supra* note 102, at 644. By contrast, in Buffalo, during the first year of desegregation (Phase I), out of a total student population of 57,235, the BPSS bused only 3,305 students. The next year, in Phase II, out of a student population of 53,764, the BPSS bused 8,350 students. Phone interview with Kathleen Shriver, BPSS paralegal (June 22, 1989).

cess. It might appoint a master or hire an expert to oversee the process; it might appoint a committee; or it might rely on the parties to call problems to its attention. Judge Curtin used a variety of methods in the twelve year remedial phase of the case. He initially considered appointing a master to take over the task of managing the re-structuring of the school system but decided not to. In his view, such a person would be "a stranger, . . . he wouldn't really understand the personalities involved, the history involved, the details And it seemed to me that since we were getting good, willing cooperation that this was not needed."¹²⁶ Judge Curtin also feared that a master would start giving orders to school officials, thus creating the possibility that two conflicting messages would be sent from the court.¹²⁷

Instead, Judge Curtin created a citizens' commission to monitor compliance and report back to him. He appointed a variety of people to the commission including those who supported the plan, some opposed to it, others neutral, labor leaders, housewives, former teachers and people from different neighborhoods in the city. The commission made a number of suggestions to the court, some of which he adopted. As the judge later stated, "it was a process of community involvement, and I thought it was more important to keep people like this involved than to bring in some outside expert."¹²⁸

After several years, Judge Curtin closed down the citizens' monitoring committee because he felt that it was developing an inflated view of its importance and power and becoming "heavy-handed."¹²⁹ He decided that a better system would allow parents in the community to make complaints directly to him.¹³⁰ In his view, "every parent of every student" is appointed to monitor the desegregation process.¹³¹ In 1987, Judge Curtin described this monitoring system:

[I]n this community . . . my office is open. We have repeated this again and again that if you have a complaint, you can send me a note. And we will have a meeting with people in the school department and they will do something about it. Now in the early stages of the case I had many complaints, and we worked at it. . . . Maybe three months ago I had a complaint. I think there was a situation where the youngster wanted to transfer to another school and the Board said for some reason no. I said well, look into it. And they looked into it. And I didn't hear anything more about it. I don't get many complaints [now]. So that means to me that parents are satisfied, and it is working.¹³²

126. Curtin Tr. 1987, *supra* note 47, at 27.

127. *Id.*

128. *Id.* at 28.

129. *Id.* at 30-31.

130. *Id.*

131. Curtin Tr. 1988, *supra* note 110, at 38.

132. Curtin Tr. 1987, *supra* note 47, at 21.

Judge Curtin's primary method of monitoring the process, however, was personal contact with the parties. He met with representatives of plaintiffs' groups and the Board at least once a week for more than six years after the liability ruling to ensure that the planning process was proceeding along the lines the court had set.¹³³ Curtin later explained the nature of these meetings and their importance to successful desegregation:

This wouldn't be hearings in court, wouldn't be part of the trial process, but it was most important. A lot of people say, 'well, judge, you shouldn't do that,' but on the other hand I don't know how else we could have worked out the problems without that kind of talking through the problem Without doing that there would be a complete logjam.¹³⁴

It was Judge Curtin's view that some neutral party had to be at those early meetings to work out conflicts between the parties as to the remedy and that it was important that he play that role.¹³⁵ Curtin noted that judges in school desegregation cases differ on the degree to which they are willing to get involved in the operation of the school system. Judge Curtin determined that the court must get into the daily workings of the institution. Not only must the court ensure that the system is being reshaped in a manner consonant with his orders and with constitutional values, but it must also arbitrate disputes between the parties as they occur.¹³⁶ He continued: "And this is sort of a strange place for a court to be. The judge becomes arbitrator, . . . he becomes confidant . . . it helps him if he can be an expert in psychology."¹³⁷

The role Judge Curtin played in the desegregation and integration of the Buffalo public school system was important to any successes that can be claimed. His requirement that community support be gained by involving the community in the desegregation process, and giving the community time to adjust to the process in small increments were undoubtedly key factors in explaining why desegregation in Buffalo was peaceful. Judge Curtin's insistence that the community know that it had access to him and that he wanted to consider the community's views in rendering his decisions must have made the community feel less impotent in the face of unsettling and unwanted changes in its social structure. Finally, Judge Curtin's active, hands-on involvement with the parties enabled him to gain immediate feedback regarding problems in the restructuring process, thus facilitating his arbitration of disputes between the parties about the appropriateness of particular elements of the remedy.¹³⁸ Thus, we can see that in the three important areas — insistence on

133. *Id.* at 13-14; *Nyquist V*, 547 F. Supp. at 469 n.1.

134. Curtin Tr. 1987, *supra* note 47, at 14.

135. Curtin Tr. 1988, *supra* note 110, at 16.

136. Curtin Tr. 1987, *supra* note 47, at 2.

137. *Id.*

138. When asked if he contacted judges in other school desegregation cases in order to determine how to set up the compliance process in Buffalo, Judge Curtin stated that he had communicated with the judge who handled the Charlotte-Mecklenburg case in North Carolina

community participation, control of the pace of desegregation, and direct and constant monitoring — the role Judge Curtin chose to play was crucial to any successful outcome in Buffalo.

This creativity and flexibility were important. Ross and Berg note that in Boston, Judge Garrity had an “iron hand at the helm” approach to desegregation which might have been viewed as arrogant and arbitrary, thus leaving the judge less able to work with the different actors in this process.¹³⁹ They compare how he “played” his role, with how an actor interprets a script:

Theatrical actors are judged not only on how well they follow their parts but also on how well they interpret their roles. That is, on their ability to add meaning to the script and to give dimension to the character.[sic] In some forms of drama, good actors innovate creatively in their parts, developing roles in a way that are at the same time both consistent with and different from the parts envisioned by the play-write.[sic] “Actors during the Boston school desegregation controversy in the early stages were distinguished by their inability to improvise and provide new meanings to the drama.”¹⁴⁰

III.

IMPORTANT SUPPORT OF THE JUDGE’S ORDERS BY MAJOR INSTITUTIONAL ACTORS

Judge Curtin’s plan for the remedy phase, his pacing of desegregation, and his close oversight of the reform process were crucial to the success of the desegregation effort. It is unlikely, however, that desegregation would have been so peaceful without the strong support of key actors within the community. This section will discuss the responses of the school superintendent and the religious community to the judge’s initial order to desegregate.

First, this section will show that Eugene Reville, Superintendent of the BPSS, followed the directions of the court to get community involvement by organizing community meetings. These meetings were an opportunity to explain how the judge could coerce compliance, as well as an occasion to encourage people to think about how they could use the desegregation process as an opportunity to improve the school system. This section will also show the strong response of the Catholic Bishop of the Buffalo diocese, who not only announced his support for the judge’s order, but also refused to allow the parochial schools to be used as a haven for those wishing to escape desegrega-

and others. He explained, however, that their solutions would have had little value in Buffalo because each remedy had to be closely tailored to the individual nature of the community. *Id.* at 6-7. In Curtin’s view, differences in leadership, history, economic structure, and the school funding process, for example, required that the desegregation process be handled differently. *Id.*

139. J. ROSS & W. BERG, *supra* note 102, at 689.

140. *Id.* at 689-90 (citation omitted).

tion. A newly formed interdenominational group of clergy also supported the judge's order by organizing groups to explain the order to their communities and by riding the buses with school children during the first days of desegregation. This section will also show the media's positive tone concerning desegregation. Finally, this section will conclude that the strong and interlocking support of these major actors played an important role in the peaceful desegregation of the Buffalo schools.¹⁴¹

A. Response and Support of Eugene Reville and the Buffalo Board of Education

Judge Curtin's orders were directed at the Buffalo Board of Education, defendants in the suit. It was the Board which was ordered to go out into the community to discuss the judge's order and to get ideas from the community on how best to implement that order. The school superintendent's response to the judge's mandate would therefore have great bearing on the likelihood of successful compliance with the court order.

In 1976, the superintendent of the BPSS was Eugene Reville, a former Buffalo school teacher and principal, whose first and major task as superintendent would be to carry out the desegregation mandate. Reville believed that it would have been impossible to persuade the white community to integrate the schools based on the notion of righting a wrong, or of remedying a constitutional violation.¹⁴² He would have to offer the white community a better education as a reason for modifying the school system.

As Judge Curtin directed, Reville went out into the community and attended hundreds of meetings at which the school superintendent developed several themes. The first message Reville sent was that "we had to obey the court."¹⁴³ He refused to spend time criticizing or defending the judge. Reville's point was that the judge had a constitutional responsibility to carry out and that there was nothing the community could do about that.¹⁴⁴ Reville also sent an important message to the community as to what sanctions were available to the court if the community refused to comply with the order to desegregate. And indeed, how could the judge's order be enforced? Should the judge hold the Board in contempt? Even if he did, that speaks only to the issue of compliance by the Board, not by citizens within the community.

Reville had an answer. He stated that when white community groups expressed anger about the judge's ruling and asked why they should obey him, Reville answered: "He can call in the 101st Airborne."¹⁴⁵ Thus, the recollection of President Eisenhower's strong response to the refusal of the Governor

141. There were undoubtedly other people less visible than these, who played an important role in the desegregation process. Further research is needed to identify them and to explore their contribution.

142. Reville Tr., *supra* note 7, at 26.

143. *Id.* at 27.

144. *Id.*

145. *Id.*

of Arkansas to protect the nine black students who integrated Little Rock High School in 1957, was used as a powerful compliance tool.¹⁴⁶

Reville also gave the community an important message of what they *did* have the power to do, and that was to come up with ideas for school programs that they wanted for their children.¹⁴⁷ He attempted to get each group focused on creating a plan. Reville stated that he was able to use some proposals but not others. And after studying the suggestions made by the community, the BPSS returned to the community association with a plan of what it was going to do.¹⁴⁸

To the extent that the BPSS was able to use part of the suggested plan, the community had a sense of ownership of a part of the desegregation process and would aid in that process in order to bring its part of the plan to fruition. Although the community plans could not all be used, it was important for the community to know that its concerns were at least being listened to and that an opportunity was available to express its anger about the desegregation mandate to a public official. The message Reville sent, then, was that the views of the people who were being affected by desegregation mattered; the court and the Board were not just going to ride rough-shod over them. The message, ultimately, was about power. The community would have some control over its destiny and over its schools. Even if a particular community was not able to get the school plan that it wanted, at least it had the power to make the powerful pay attention without resorting to violence to get that attention.

146. As the first step in court-ordered desegregation, 15 black children were to be enrolled in Little Rock Central High School, which had a white enrollment of approximately 2,000. W. RECORD & J. RECORD, LITTLE ROCK, USA 35 (1960). On September 4, 1957, acting pursuant to the orders of Governor Faubus, the National Guard ringed Central High school and refused to allow the black students to enter. *Id.* at 40-41. On September 20th, Faubus withdrew the National Guard in response to a federal court order enjoining him from using the National Guard to obstruct the judicial process. *Id.* at 56. On Monday, September 23rd, "a howling, shrieking" mob outside and disorderly students inside the school forced school authorities to withdraw the black students from the school, only three and a half hours after they entered it. *Id.* at 59. On that same day, President Eisenhower issued an emergency proclamation commanding all those obstructing justice in Little Rock to "cease and desist and disperse," and threatened to use whatever force was necessary to enforce the court order. *Id.* at 64. On September 24th, as a mob gathered in front of the school again despite his emergency proclamation, President Eisenhower federalized the Arkansas National Guard, and flew 1,000 members of the 327th Airborne Battle Group of the 101st Airborne Division into Little Rock from Fort Campbell, Kentucky. *Id.* The next day nine black students attended their first full day of classes at Central High School under the protection of federal troops. *Id.* at 78-79. President Eisenhower released the National Guardsmen from duty on May 8, 1958. *Id.* at 94.

The example of the desegregation furor in Boston provided an even more immediate and potent statement of what would happen if Buffalo decided not to comply with the judge's orders. Even before the liability opinion was handed down, there were articles in the local Buffalo newspapers asking whether Buffalo would explode as did Boston, with arson, property destruction and deaths. As one Buffalo minister later stated: "We feared the worst, after what happened in Boston. We did not want Buffalo to be torn apart by violence." R. Brooks, *supra* note 49, at 3. Thus, the fear that Buffalo might end up like Boston provided a strong incentive to obey the court order.

147. Reville Tr., *supra* note 7, at 27.

148. *Id.* at 27-28.

Finally, Reville might well have noted in these meetings that there would be federal funds available to aid the BPSS in its desegregation effort.¹⁴⁹ This news, to a city which suffered a serious economic decline due to the loss of heavy industry,¹⁵⁰ must have looked like a blessing in disguise. A fresh influx of money would enable the city to create new and exciting programs for both white and black school children.

In a sense, then, the white community would be receiving a new and updated school system as a reward for its decades of mean-spirited, segregative acts against the black community.¹⁵¹ To the extent that social change takes place, however, the oppressor group must get something in exchange for what it feels it is losing, which was, in this case, segregated schools as a symbol of the inferiority of the black community and the superiority of the white community.¹⁵²

B. Response and Support of Religious Leaders

The reaction of religious leaders was another significant factor. Even before Judge Curtin issued his order, certain of the city's religious leaders prepared themselves for desegregation. First, they talked to the religious leaders in Boston to learn from that city's mistakes. Second, they formed the Buffalo Area Metropolitan Ministries ("BAMM"), an interdenominational and interracial council, to address social issues in the community. The first issue on BAMM's agenda was school integration.¹⁵³

Because Buffalo is a predominantly Catholic city,¹⁵⁴ a positive response from the Bishop towards desegregation was essential. That message was im-

149. Buffalo has been very successful in obtaining federal funds to assist in school desegregation, largely due to the efforts of Jack Kemp, former Republican representative from the Buffalo area, and Senator Daniel Patrick Moynihan (D-N.Y.). *Id.* at 46. Buffalo has received more federal funding for desegregation than any other school district in the country. *Id.*

150. See M. GOLDMAN, *HIGH HOPES: THE RISE AND DECLINE OF BUFFALO, NEW YORK* 267-77 (1983). Because of this economic decline, between 1950 and 1980 Buffalo's population declined from 532,000 to 357,000. *Id.* at 284.

151. The irony of "rewarding" those who refuse to make much needed social change is not confined to the field of discrimination. For example, in the area of environmental protection, the huge federal grant program for sewage treatment plants in the 1972 Clean Water Act, see 33 U.S.C. §§ 1281-99 (1982 & Supp. V 1987), was effectively a reward to municipalities and states which had neglected the pollution for decades, because local politicians were unwilling to tax their constituents for this purpose. My thanks to Barry Boyer for this observation.

152. See H. RODGERS & C. BULLOCK, *supra* note 122, at 3-5, 124 (discussing the "cost/benefit" theory); see also Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597 (1958).

Even when the oppressor group gets some benefit for its illegal acts, as an incentive to allow the illegality to be remedied, it is not uncommon for some members of that group to want *all* the benefits, even to the extent of denying them to the group which suffered from the illegal acts. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 192 (1979), wherein the employer and union jointly created a special craft training program for both white and black employees in order to remedy the historic exclusion of blacks from craft unions and one white employee claimed he should receive a trainee position from the half allotted to black employees.

153. R. Brooks, *supra* note 49, at 5.

154. At the time when court-ordered desegregation was beginning, Buffalo was 65% Catholic. The Catholic community was concentrated in South Buffalo, which was predominantly

mediate and unambiguous. Only six days after the liability opinion was handed down, Bishop Head pledged his support for the order.¹⁵⁵ BAMM pledged its support a few days later.¹⁵⁶ Soon thereafter, Bishop Head stated in an article in a local Catholic journal that the Diocese of Buffalo would not allow the parochial school system to become a refuge for "white flight" from the public schools.¹⁵⁷ White parents would not be able to avoid the desegregation in the public schools by transferring their children to parochial schools. The superintendent of the Buffalo Catholic school system, Monsignor Ryan, imposed and enforced strict guidelines for entrance into the local Catholic schools in order to carry out this directive. As Monsignor Ryan stated, "we were determined to cooperate with the spirit of Judge Curtin's order and not to become a receiving facility for intercity white flight."¹⁵⁸

Also, in the summer of 1976, Bishop Head sent letters to every parish in Western New York to be read at service in every Catholic church stating that the Diocese of Buffalo was committed to quality integrated education, and that it was the responsibility of the church to help achieve that goal. "The church," he wrote, "conscious of her mandate from the Lord and striving to promote the Gospel message, must be one of the principal actors in the urban drama that is being played out in the cities across this nation."¹⁵⁹ As Bishop Troutman now recalls, all Catholic priests were urged to preach the message of Christian love as it related to the issue of school integration.¹⁶⁰

As this was going on within the Catholic religious community, BAMM developed two strategies to facilitate the process of integration. First, it held meetings in churches and temples within the area to educate the public as to the desegregation process.¹⁶¹ The second strategy was for BAMM members — ministers, rabbis and priests — to ride the school buses and walk to the schools with the children during the first days of integration. Many BAMM participants wore their clergy collars so that the children would behave calmly and to deter any confrontations or violence.¹⁶² Thus, the message sent by the

Irish, and in the Polish and Italian communities, located on the east and west sides of Buffalo respectively. *Id.* at 4.

155. *Id.* at 7-8.

156. *Id.* at 8. BAMM included members of the Catholic clergy. *Id.* at 5.

157. *Id.* at 14.

158. *Id.* at 14-15. In Judge Curtin's view, the Catholic church followed through on this commitment. Curtin Tr. 1987, *supra* note 47, at 37-38.

159. R. Brooks, *supra* note 49, at 16.

160. *Id.* It is interesting to note that the initial response of the Catholic Church in Boston was much the same as that in Buffalo. The Boston Archbishop sent pastoral letters supporting busing to achieve desegregation and announced that it would restrict transfers from public to parochial schools. D. GARTH TAYLOR, PUBLIC OPINION AND COLLECTIVE ACTION: THE BOSTON SCHOOL DESEGREGATION CONFLICT 102-103 (1986). This early attempt at moral leadership, however, did not prevail within the church constituency. *Id.* at 103-23; *see infra* note 175. The fact that Bishop Medeiros had come to Boston very soon before the court order to desegregate, and that he was Boston's first non-Irish-American Bishop in more than 125 years, must have weakened considerably his influence in this matter. *Id.* at 108.

161. R. Brooks, *supra* note 49, at 11-12.

162. *Id.* at 12.

Buffalo religious community as a whole included several important components: whole-hearted support by the clergy for the desegregation effort; active participation in the effort by the clergy; and statements by the clergy that the judge's order to desegregate could, and should, be embraced within the tenets of their religion.¹⁶³

*C. Interlocking and Mutual Support of
These Institutional Actors*

The extent to which the key players — plaintiffs, school superintendent, judge, clergy — worked together for compliance in Buffalo is also important. Judge Curtin noted in his opinion that plaintiffs' and defendants' cooperation with each other could be seen in the fact that there were 161 stipulated facts, which facilitated trial of the case.¹⁶⁴ Judge Curtin also held weekly meetings with plaintiffs and the Board for the first several years after the liability decision to lend his offices to facilitate the compliance process. Similarly, he opened his office to complainants in order to facilitate communication between disaffected citizens and the BPSS.¹⁶⁵ The school principals asked ministers and priests to come to their schools at the close of day to deter violence.¹⁶⁶ And, as Curtin noted, even when the Board voted against a desegregation plan proposed by the superintendent, Board members did not try to organize the opposition if they lost.¹⁶⁷

Even now, the key players are able to see the contributions of the other players, and give them credit for the peaceful integration of the schools. David Jay, counsel for plaintiffs during part of the remedy phase, although still dissatisfied with the way that the schools are being integrated, gives the Board credit for defusing a very strong racist response among certain segments of the white community by giving jobs to some of the most vociferous

163. One might also see the media as a major actor in the desegregation process. Through its editorials and reporting policy, it influenced the public response to the desegregation process. According to Judge Curtin, the media was very helpful. Although he thought that the *Buffalo News* had been more positive than the *Courier*, in his view both of Buffalo's daily newspapers "approached the problem with a good deal of common sense." Curtin Tr. 1987, *supra* note 47, at 36. On several occasions the *Buffalo News* printed the whole court order, so that the public could know why certain decisions were made. And, although the *Courier* sometimes represented a particular neighborhood interest, it was never negative. *Id.* at 36-37. Curtin also noted that the radio and television stations provided free time to announce the time and place to apply to magnet schools. *Id.* at 37. Further research is needed to develop and clarify the role of the media in this process.

164. *Nyquist I*, 415 F. Supp. at 910.

165. Curtin Tr. 1987, *supra* note 47, at 13-14.

166. R. Brooks, *supra* note 49, at 12.

167. Curtin Tr. 1988, *supra* note 110, at 29. The fact that many players managed to work together should not be read to conceal the very real tensions and hostilities which existed. Many of their statements show that it was difficult for plaintiffs and the Board to work together without the judge's presence and willingness to arbitrate disputes. These statements also indicate that there were many complaints within the community, that the school principals feared violence, and that the Board was not unanimous in its support of the desegregation plans.

anti-busing forces in Buffalo.¹⁶⁸

Monsignor Ryan, superintendent of the Catholic school system in the Diocese of Buffalo, and Eugene Reville, superintendent of the BPSS, were in daily contact during the early period of desegregation to discuss their mutual concerns.¹⁶⁹ Monsignor Ryan identifies the "expert detailed" planning of Reville and Joseph Murray, the Assistant Superintendent of the BPSS, as the single most important factor in getting peaceful compliance.¹⁷⁰ Rev. Armstrong, another member of BAMM, thinks Joseph Murray and Judge Curtin were the most important players — Curtin, because he was careful not to try to run the schools, and Murray, because he put the plan together.¹⁷¹ Armstrong also notes the importance of the parents in planning the integration process and sees them as key actors in this drama.¹⁷² Thus, there is a sense in the community of having accomplished something very important together.

Perhaps this unique cooperation developed because, in one sense, plaintiffs and the defendant Board have been on the same side in this case. One scholar has suggested that institutional reform cases are often successfully litigated because the plaintiffs and the defendants really want the same result.¹⁷³ In this case, it is clear that plaintiffs have been on the same side as the defendant Board whenever the Board has asked Judge Curtin to order the Mayor and Common Council to make available money for desegregation.¹⁷⁴ And clearly they are on the same side now, as both parties find it beneficial to be under the jurisdiction of the court. Plaintiffs want the court as a powerful ally in their continuing argument with the BPSS over how best to provide quality, integrated education to black school children. Similarly, the Board wants the court as a powerful ally in its continuing struggle with the Mayor and Common Council for adequate school funding.

The major actors sent strong messages of support as individuals, and as representatives of major institutions. Undoubtedly, their individual messages were strengthened by the interlocking support they provided each other, by the support of the media and by the united front they presented to the community.¹⁷⁵ It is less clear, however, why they acted this way. It was perhaps a

168. Jay Tr., *supra* note 44, at 24. This Article focuses on the principal actors in the desegregation process and the nature of the messages they sent to the community about that process. Further research is needed into the nature of the various communities in Buffalo which received those messages, and the social, political or economic characteristics of those communities that made peaceful desegregation possible.

169. R. Brooks, *supra* note 49, at 13-14.

170. *Id.* at 17.

171. *Id.* at 17-18.

172. *Id.* at 18.

173. Levine, *The Role of the Special Master in Institutional Reform Litigation: A Case Study*, 8 LAW & POLICY 275, 292, 307 (1986). I thank Prof. Adeline Levine for this insight and this reference.

174. Jay Tr., *supra* note 44, at 22; Curtin Tr. 1987, *supra* note 47, at 44.

175. Inconsistent messages and messages of non-support for the court order of desegregation undoubtedly played a role in creating or enhancing community defiance of that order in Boston. The mayor's public statements, some of which suggested that it was legitimate for

result of their personalities, or their sense of what was good for the community, or of what was possible in the community. In the view of Marilyn Hochfield, a member of plaintiffs' legal team, "the people and the times, and the conjunction of the people and the time, is what produces social change."¹⁷⁶ In 1976, with respect to the process of peaceful school desegregation, Buffalo simply hit the right "conjunction of the people and the times."¹⁷⁷

IV.

HOW SUCCESSFUL HAS THE JUDGE BEEN IN THE INTEGRATION OF THE SCHOOLS?

All of the parties involved in this suit are clear that the schools were peacefully desegregated, and that that in itself is worthy of notice and praise. There is disagreement, however, on whether integration has been as successful. There is also disagreement as to what one means by "successful." This section will address that question by looking at the definitions of "success" of four of the five actors interviewed: Judge Curtin, the school superintendent, a representative of plaintiff organizations, and one of plaintiffs' attorneys. Through their responses, we will see that the definition of success varies according to one's mandate, one's constituency, and possibly, one's race. This section will then further emphasize the contingent nature of "success," by showing how unexpected factors impinge on the remedy process and how hard-won gains can be lost. It will look at the comments of seminar students who visited classes in the BPSS to assess what was taking place in the desegregated schools. We will see that, despite many positive changes, an underlying

white parents to boycott the schools, served only to confuse the public as to their obligations under the court order. D. TAYLOR, *supra* note 160, at 138-43. When the mayor asked President Ford to send the United States marshalls into Boston to control violent demonstrations, President Ford refused, stating that he disagreed with the court order to desegregate. *Id.* at 135. As the desegregation process continued, the church leadership in Boston weakened its resolve to block white flight to parochial schools. The church also changed its pro-busing position to one urging non-violent protest against busing. *Id.* at 103, 110-11.

Judge Curtin suggested that desegregation was more acceptable eventually in Buffalo than in Boston because of the racial integration in the steel mills which provided jobs for so many citizens of Buffalo up until the 1970s. It was his view that, despite the racial discrimination in those mills, the white workers at least had the experience of working alongside black workers, thus decreasing the social distance between the two groups. Curtin Tr. 1988, *supra* note 110, at 22-24. Judge Curtin, his father and brothers all worked in the steel mills. *Id.* at 23.

These suggestions as to why Boston and Buffalo reacted differently to court-ordered desegregation focus on the nature of the response of major institutional actors to the court order and the nature of the community which was obligated to change its social structure in response to that order. Further research in this area would provide important information on the varied responses to court-ordered change.

176. Hochfield Tr., *supra* note 11, at 2.

177. The fact that the major players were all born and raised in Buffalo must have also been an important factor. Judge Curtin and Eugene Reville, School Superintendent, were both raised in largely Irish-Catholic South Buffalo; Joseph Murray, Assistant Superintendent, was raised in the Riverside section of Buffalo; and Frank Mesiah was raised in the west side of the city. They each had an insider's knowledge of the social and political structure of the community, a necessary element in easing racial tensions during the desegregation process.

racism within the desegregated schools still has a negative impact on black students. Desegregation may have brought more limited benefits than plaintiffs had anticipated. Finally, this section will conclude by pointing out that little is accomplished by modifying one aspect of the social structure if the underlying dynamic of racism remains untouched.

We start this section by returning to the initial issue of defining "success": what does it mean? Does it merely mean peaceful compliance with the court orders to desegregate? One way to look at this question is to ask the purpose of the litigation: was it to improve the quality of education for black school children, to improve racial harmony within the community, or to fulfill the constitutional mandate of "equal protection of the laws?"

In order to find out the purpose of the litigation, one could ask plaintiffs what they wanted when they filed suit, and whether or not they obtained what they wanted. In cases such as this, however, which involve class actions and institutional plaintiffs such as CCHR and the NAACP, there would probably be as many answers to that question as there are members of the groups. Nonetheless, in an effort to address this issue, the question was put to Frank Messiah, present and one-time past co-chair of CCHR and an officer of the NAACP, thus a representative of both institutional plaintiffs in the suit.

Messiah was clear. Black parents wanted equity for black school children, and they did not get it.¹⁷⁸ In his view, it was wrong for the court to allow the defendant Board to create the plan for desegregation. As he stated, it was like "leaving the evacuation of the wounded to those who shot them down."¹⁷⁹ The Board created a plan that would appeal to the white community to gain its cooperation in desegregation, instead of one that appealed to the black community, the victim of a constitutional wrong.¹⁸⁰

Messiah also argued that equity for black school children was not achieved because desegregation was based on the concept of magnet schools. This concept merely succeeded in creating a new kind of elite class within the school system — those students in magnet schools and programs.¹⁸¹ Not only is a two-tier system perpetuated, he argued, but the system draws middle class students and parents who are attracted by magnet schools and programs away from the non-magnets.¹⁸² Left in the remaining schools, therefore, are students who are achieving below grade level in reading and mathematics, and who are not getting the support services they need. As a result, in the black student population in non-magnet programs and schools there is a disproportionately high drop-out rate, high suspension rate, and high rate of referral to

178. Messiah Tr. 1988, *supra* note 81, at 20.

179. Messiah Tr. 1987, *supra* note 11, at 5.

180. *Id.*

181. Messiah calls magnet schools "the Cadillacs of the system." *Id.* at 7.

182. *Id.* at 12-13. Magnet programs ("mini-magnets") are specialized programs operating within neighborhood schools. For example, at Bennett High School, there are "mini-magnets" in computer science, law, and international studies. Buffalo News, Jan. 27, 1986, at B5, col. 1.

special education classes.¹⁸³ According to Messiah, although those black students in the magnet programs and magnet schools are probably happy, and have benefitted from desegregation,¹⁸⁴ *each* school should be a "special" school, and each school child should be taught to his or her top potential.¹⁸⁵ It is a system, he added, which keeps students apart, thinking that one group is better than the others, instead of keeping them together, and looking at what they have in common.¹⁸⁶

Finally, Messiah stated that the BPSS still teaches a racist, eurocentric curriculum. In his view, too many people view desegregation as "black kids becoming whiter, instead of white kids becoming blacker."¹⁸⁷ As long as that view persists, racial mixing by mere percentages achieves little: "desegregation . . . is more than just a mixing of bodies."¹⁸⁸ In conclusion, Messiah stated that he has seen no progress within the community in terms of social awareness or better relations between black and white.¹⁸⁹ Maybe things would be different, he thought, if there had been more struggle after the court order. Maybe there would have been a different kind of change.¹⁹⁰ But the magnet school plans defused the angry energy of plaintiffs, and no other options were seriously considered.¹⁹¹

David Jay, counsel to plaintiffs during the remedy phase of the litigation, reiterated Messiah's concern about the impact of the magnet school solution on the problem of segregation:

Forget about Montessori and the Performing Arts, and all the stuff that is all wonderful, and looks great in the press, and you bring in some Congressman or Senator to declare the school a wonderful school, but what about the rest of them? Many of us believe that those frills are being given to those particular schools at the expense

183. Messiah Tr. 1987, *supra* note 11, at 12, 16. Messiah notes that in the category "severely mentally retarded," where there is no question as to the appropriateness of the identification, black children are represented in roughly the same proportion as in the general population. In his view, this highlights the over-referral of black school children to special education classes. *Id.* at 28-29.

Scholars have noted the existence of these "second-generation" desegregation problems which face black children in integrated schools. Along with those noted by Messiah, they include re-segregation within the school through "tracking" by ability; self-segregation; disproportionate suspension, truancy and drop-out rates; eurocentric curriculum; and biased counselling about colleges and vocational training. BERRY & BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* 281-83 (1982); HUGHES, GORDON & HILLMAN, *DESEGREGATING AMERICA'S SCHOOLS* 141-48 (1980); HAWLEY, CRAIN, ROSSELL, SMYLLIE, FERNANDEZ, SCHOFIELD, TOMPKINS, TRENT, ZLOTNICK, *STRATEGIES FOR EFFECTIVE DESEGREGATION* 97-135 (1983).

184. Messiah Tr. 1987, *supra* note 11, at 19.

185. *Id.* at 26.

186. *Id.* at 26-27.

187. *Id.* at 29.

188. *Id.*

189. *Id.* at 30.

190. *Id.* at 17.

191. *Id.* at 17-18.

of others. We would much rather see . . . all the test scores going up. . . .¹⁹²

Magnet schools, the cream of the crop will go to the magnet schools. It is for them. Everybody else gets something less.¹⁹³

Another problem Jay saw with the magnet schools was the reliance on federal funding for the programs. His concern was that once the school system was considered "unitary,"¹⁹⁴ and the federal government no longer provided money for the desegregation effort, the more expensive magnet schools and programs would drain city money from the rest of the system.¹⁹⁵ When asked specifically what plaintiffs wanted, he answered, "that every child in this city, white or black, have a decent education, and an integrated education. That is what we want. That is all we have ever wanted."¹⁹⁶

Jay admitted that some parts of the school system are excellent¹⁹⁷ and that school integration has benefited the whole city.¹⁹⁸ He was convinced that if things had stayed the same, "we would have had wars going on in this city."¹⁹⁹ But he pointed out continuing problems plaintiffs have faced during the remedy phase. First, as of the spring of 1987, there were still eight schools with a minority enrollment exceeding sixty-five percent, thus violating the court guidelines for an acceptable level of integration.²⁰⁰ A second concern was a failure to hire minority teachers sufficient to meet the one-for-one hiring order imposed by Judge Curtin in 1979.²⁰¹ In Jay's view, the BPSS recruitment effort was inadequate with respect to both effort and funding.²⁰² In fact, Jay wondered why the BPSS requires that teaching applicants with valid teaching certificates pass a series of tests before they are eligible for hire, when the poor showing of minority candidates on one of the tests makes the task of

192. Jay Tr., *supra* note 44, at 16.

193. *Id.* at 17.

194. "Unitary" means in full compliance with the mandate of *Brown v. Board of Education*. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971).

195. Jay Tr., *supra* note 44, at 24.

196. *Id.* at 15-16.

197. *Id.* at 3.

198. *Id.* at 26. At another point, Jay stated that he had not seen much change in social relations between the races as a result of desegregation. *Id.* at 13. Perhaps this apparent contradiction in Jay's analysis of whether school desegregation has been "successful," was merely a reflection of his sense that some things are better because of desegregation, but not as many as he would have liked.

199. *Id.* at 26.

200. *Id.* at 27. In September 1988, Jay announced that ten schools had a minority enrollment between 70% and 91% in the 1987-88 school year, in violation of the court's order that minority enrollment not exceed 65% in any one school. Thus, the trend towards integration is lessening, and resegregation of the BPSS is taking place. *Buffalo News*, Sept. 10, 1988, at A1, col. 5. School Superintendent Reville responded that part of the problem is the inclusion of latinos as a minority group, especially since latinos are the fastest growing population group in Buffalo. *Id.*

201. *See supra* note 61.

202. Jay Tr., *supra* note 44, at 4.

recruiting black teachers more difficult.²⁰³ Although a state statute requires cities over 400,000 to give a pre-eligibility examination,²⁰⁴ as of the 1980 census, Buffalo had only 365,000 people, and was no longer governed by that statute.²⁰⁵

Jay also pointed out that plaintiffs have asked the BPSS to produce student achievement test score data broken out by race for more than one year. Despite the court's order that such data be provided to plaintiffs, the BPSS had not yet produced the data.²⁰⁶ Jay's response to the BPSS statement that it could not provide plaintiffs with that data because it does not keep test scores by race, was "humbug!"²⁰⁷ Jay found it difficult to believe that a school system with the computer capability of the BPSS which had been working on a school desegregation remedy for eleven years, would be unable to retrieve standardized test scores categorized by race for all its students.²⁰⁸ In fact, Superintendent Reville stated in 1988 that black students were closing the gap with white students with respect to standardized test scores,²⁰⁹ suggesting that such information was available to BPSS, but not to plaintiffs. Thus, if one is measuring "success" by improved reading and mathematics skills for black students as shown by their scores on standardized tests, plaintiffs cannot now determine if school desegregation has been "successful."²¹⁰

Eugene Reville, school superintendent of the BPSS since 1975, faced a set of problems which differed from those of the plaintiffs and which, therefore, would shape his definition of "success." First, he would have to devise educational programs that were so attractive that the white community would accede to desegregation rather than flee the BPSS. The programs would have to be so attractive that white parents would even be willing to bus their children into the black community to attend school.²¹¹ As he later noted: "Parents are free agents. If they don't like the schools you have, they are not going to keep

203. *Id.* In 1986, nearly 75% of the minorities who took the Buffalo teachers' exam failed it. Buffalo News, Jan. 21, 1987, at A1, col. 1.

204. N.Y. EDUC. LAW § 2573 (10-a) (McKinney 1982).

205. Jay Tr., *supra* note 44, at 6.

206. *Id.* at 18-19.

207. *Id.* at 19.

208. *Id.*

209. Reville Tr., *supra* note 7, at 16-17.

210. Jay also pointed out that plaintiffs have only one person, Carol Streiff, working part-time to monitor compliance with the court order. Despite the excellence of Streiff's work, plaintiffs compared this to the situation in Cleveland, where the judge created a monitoring system with a full-time staff. Jay Tr., *supra* note 44, at 23. As Jay suggested, it is almost impossible for one part-time person to know what is going on in a quarter-billion dollar operation. *Id.*

211. Reville Tr., *supra* note 7, at 26. For this reason, Reville decided to put all of the magnets in the black community. *Id.* at 10-11. Only one magnet school is now located in the white community. *Id.* at 20-21.

In this regard, Reville stated only that there cannot be a successful desegregation program if there are not enough middle-class students. *Id.* at 14-15. While this might be true with respect to a "successful" desegregation program, there will be no desegregation program at all if the white parents flee the city school system.

them in those schools. They are going to move.”²¹² BPSS had to provide attractive alternatives and a better education. Thus, Reville had to ensure that the physical fact of desegregation could actually take place, before moving on to address what went on in the newly integrated schools.

When Reville was asked how he measured “success” for purposes of the integration effort, he listed several indicia. Regarding the court’s thirty to sixty-five percent ratio for racial balance, he stated that as of March 1988, only four schools were out of balance, (i.e., over sixty-five percent of the population was minority or non-minority), and that he expected one of them, a newly created science magnet, to become racially balanced shortly.²¹³ Thus, he saw the BPSS as successful in calming fears in the white community sufficiently to make desegregation a fact. With respect to what was taking place in the newly integrated schools, Reville pointed out that standardized test scores in reading and mathematics for all students in Buffalo have increased since 1976. Although black students are not performing as well as white students, “they are closing the gap.”²¹⁴ In terms of the disproportionate drop-out rate for black youth, the percentage differential between drop-out rates of white and black youth has decreased from nineteen percent to less than one percent since the 1973-74 school year.²¹⁵ Reville also pointed to the numerous awards given to Buffalo schools by national and state commissioners of education, as a testimony to the positive effect of school integration on the entire system.²¹⁶

Reville saw all of these improvements as a direct outcome of the desegregation effort. The court order to change the system and the money made available for desegregation efforts allowed him to make the changes needed to improve the quality of education overall. In his view, without the court mandate to integrate, “you couldn’t do in Buffalo in 100 years what we did in five years,” due to the inertia of a very large and entrenched bureaucratic system.²¹⁷

212. *Id.* at 15.

213. *But see supra* at note 200.

214. Reville Tr., *supra* note 7, at 16. Again, this indicates that BPSS does keep test scores broken out by race so as to assess the progress of black children in newly integrated schools. Reville’s comment, however, shows that he was comparing the wrong pools of students. If one wants to determine whether black school children are learning better in integrated schools, their progress should be compared to the progress of black children who are not in integrated schools. H. RODGERS & L. BULLOCK, *supra* note 122, at 149. By making the comparison between white and black children in integrated schools, Reville made his task harder. Integrated schooling is then required to compensate for all the other social handicaps imposed on black children and their families. Expecting black school children who suffer social disabilities which white children do not suffer, to achieve in school in the same way, is an expectation which will not be fulfilled. It probably was, however, what Reville’s constituency expected him to achieve. Thus, in political terms, he probably did make the right comparison.

215. Plaintiffs argue that the drop-out rate for black students is 48.4% and 42.6% for white students. Thus, plaintiffs have argued that the drop-out rates of white and black youth have decreased to a six percent differential and not a one percent differential as claimed by Reville. Buffalo News, July 2, 1986, at B2, col. 1.

216. Reville Tr., *supra* note 7, at 19-20.

217. *Id.* at 20.

Reville also believes that another positive result of the city-wide desegregation effort was improved relations between the races. He told of a recent meeting with white parents who wanted the Early Childhood Center which their children were attending to be extended through the third grade.²¹⁸ Reville pointed out that if that change were made, they would have to bus their children into the black community another year. The parents' answer to Reville was laughter. They told him that they "had gotten over that stuff."²¹⁹

Reville believes strongly that the task of integrating the schools has just begun. He emphasized that one has to work on integration constantly:

Just because you integrate the schools doesn't mean that you have gotten rid of racism [I]t's within the school system. . . . So you have got to talk to the teachers about their own attitudes [about race] I believe, that in a school system you have got to work on integration constantly. I call it the unfinished business. Because we've racially balanced our schools doesn't mean that we have solved the problem. The major problem is ahead.²²⁰

We've desegregated, and now we've got to integrate the schools by concerning ourselves with whether or not there's true integration in the schools, and whether or not the victims of the discrimination are having their education improved. And that, in the final analysis, is the most important thing that we do.²²¹

Addressing the charges that the magnet schools the BPSS created to foster integration had brought a new form of elitism to the Buffalo schools, Reville stated: "You have got to start somewhere with a touch of quality." After that, "you can bring the entire district up."²²² When principals of non-magnet schools argued with the Board that "magnets get everything and we get the leftovers," Reville asked them: "What are you going to do about it? What kind of programs do you want to develop in your school to attract students back, and generate excitement?"²²³ To the question of whether all schools, magnet and non-magnet alike, received roughly the same resources, he responded that resources in the school system are allocated much as they are to the children in a family, that is, based on need. "People argue that every school should get the same. That will never be true, and it never should be the same. Handicapped kids will get more, kids with reading problems will get more, vocational schools will get more."²²⁴ Reville also stated that his office had tried to address the disproportionately high rates of suspension and

218. *Id.* at 50-51.

219. *Id.* at 51.

220. *Id.* at 38-39.

221. *Id.* at 44-45.

222. *Id.* at 34. Rossell claims that "there is no dual system of elite magnets and mediocre regular schools" in Buffalo, based on her analysis of standardized reading and math scores for magnet and regular schools over a ten-year period. Rossell, *supra* note 5, at 349-51.

223. *Id.* at 35.

224. *Id.* at 45.

referral to special education of black school children by creating two task forces to look into the causes for those high rates and to make recommendations for eliminating them.²²⁵

When Judge Curtin was asked whether school desegregation was "successful" here, he prefaced his remarks by stating that in his view, "Americans have a very short concentration period . . . they want to have immediate results."²²⁶ He continued:

They said, "Well, we have integrated your schools and that was two years ago and now the youngsters in the second grade, how are their reading scores now . . . ?" The trouble with all of this business is that it is a long process But I think to say that . . . right away, after two of three years, "well it really hasn't upped the educational scores," I think that is sort of foolish. Because maybe it doesn't make any difference whether you do or you don't . . . The essential thing is that . . . [the] citizens in our country . . . should have fair and

225. *Id.* at 41. In December 1986, Reville asked me to become a member of the Superintendent's Task Force on Handicapping Conditions, which would address the problem of the disproportionate number of black students being referred to special education classes. The data showed that in the BPSS, a school system with a student body which is approximately half-white and half-black, half-male and half-female, the following referrals took place in the 1985-86 school year:

minority males	625
minority females	300
majority males	448
majority females	135

SUPERINTENDENT'S TASK FORCE, BUFFALO PUBLIC SCHOOLS, REPORT OF THE SUPERINTENDENT'S TASK FORCE ON HANDICAPPING CONDITIONS 15 (June, 1987).

The eight person Task Force included parents of disabled children, special education specialists within the BPSS, community activists, and the chairman of the Exceptional Education Department of a local college. *Id.* at 1-2. The Task Force set as its goals: (1) to determine why there was a disproportionate referral of black students to special education classes, and (2) to determine strategies to remedy the problem. *Id.* at 1. In order to do this, the Task Force reviewed the current situation in the BPSS through staff interviews with school teachers and principals, reviewed current research literature on the issue, held open hearings in the community and reviewed the legal restraints on special education placements. *Id.* at 3-4. The Task Force recommendations were presented to the Superintendent in June 1987. Those recommendations emphasized the creation and implementation of procedures designed to address emerging learning problems through alternative techniques, prior to a formal referral to special education. This would include providing additional special education supervisors to serve as resource persons for regular education teachers. *Id.* at 66-70. The Task Force reconvened in March 1988, to assess the progress of the BPSS on those recommendations. Letter from Rasheeda Seabrook and Maria Kerber, Co-Chairpersons Superintendent's Task Force on Handicapping Conditions, to Superintendent Eugene Reville (Mar. 25, 1988).

The Superintendent's Task Force on Suspensions issued its follow-up report on the recommendations made in June 1987. It noted with approval that there was close to a 50% reduction in the number of suspensions during the first 20 weeks in 1988, as compared with the same period in 1987, and suggested further efforts by the BPSS, including improved procedures for suspension, and strengthening parent-school relations. Letter from Dr. William B. Bennett, Chairperson, Superintendent's Task Force on Suspensions, to Superintendent Eugene Reville (May 19, 1988).

226. Curtin Tr. 1987, *supra* note 47, at 39.

equal treatment, whether they are in schools or whether they are in the workplace or doing anything else in our communal life.²²⁷

The definition of "success" thus varies depending on one's mandate and one's constituency. Judge Curtin, who, as a federal judge, was sworn to uphold the Constitution, suggested that the vindication of constitutional rights was of primary importance. Plaintiffs' representatives offered slightly different definitions of "success." Mesiah, who is a black and an officer of the NAACP as well as CCHR, focused on equity to black schoolchildren in a non-racist setting. Jay, a white attorney representing plaintiffs, said he wanted to see a rise in all the test scores; he wanted a decent, integrated, education for all school children, both black and white. And, Superintendent Reville saw "success" in terms of his two major tasks: first, to ensure the physical desegregation of the schools, and then, to improve the quality of education for black school children within those schools.

"Success" can also mean non-racist teacher-student and student-student interactions and a nonracist curriculum in an integrated setting. To measure these factors, students from the two seminars visited individual schools in the BPSS and reported on what they saw.²²⁸ Their overwhelming response was that the classrooms were indeed integrated numerically; that the teachers interacted with black and white students in much the same way; and that pictures on bulletin boards in halls and classrooms were racially mixed. In areas where unstructured activity was allowed, halls and lunch rooms, groups of

227. *Id.*

228. *See supra* note *. Reville invited the seminar students to visit any school at any time. He asked only that arrangements be made in advance to ensure that they would not arrive on, for example, a testing day. Kathy Shriver from the BPSS was most helpful in arranging these visits.

In the spring of 1987 and 1988, thirty students from the seminar, including both law students and graduate students in other disciplines, visited schools in Buffalo. They made their own selections as to which school they wanted to see. Some wanted to see the much-praised magnet schools, some went back to schools they had attended as children, and some went to the neighborhood schools their children attended. They reported on a total of five high schools and fifteen schools for lower grades. Some went with another classmate, some went alone.

This was not a controlled social science study, but a collection of perceptions of what was going on in the school system by interested observers who had all been in the lower grades at one time, and who are all involved, as white or black students, in the on-going study of race relations in this country.

We asked the students to think about the following questions during their visits: (1) *Is the school integrated?* How is it integrated? Note the racial configuration of classroom, school; note extent of integration in non-structured settings, such as halls, library, lunchroom; (2) *What is going on in the integrated setting?* Does it foster positive relations between majority and minority students? Does it create a good learning situation for minority students? (3) *How does the teacher relate to majority and minority students?* (a) Note, for example, who gets called on more in class, who gets called on for the easy and the hard question; note whether the teacher stands near some students — in a controlling way or in a supportive way; does the teacher wait longer for an answer from some students? (b) Note also the textbooks: are different kinds of people portrayed in the textbooks? How are minorities portrayed? and (4) *Does the physical setting foster a good learning situation for minority students?* Note material on bulletin boards, walls; note magazines and books on display in library and classrooms.

students were sometimes mixed, sometimes not. All reports indicated, however, that there was more self-segregation by race after the seventh grade than before, no matter where the students were. At one high school, the black students entered by one door, and the white students by another. With respect to seating within the classrooms, there appeared to be little segregation, whether by the teachers or by the students.²²⁹ The seminar students also noted that the teachers were predominantly white, and the teachers' aides largely minority. They pointed out, however, that there were black principals at a few of the schools they visited.²³⁰

They found other situations worthy of note. One seminar student was struck by the fact that in the seventh grade science class she visited, the teacher asked one black girl who had completed her assignment early to help two white girls who were having difficulty with the work.²³¹ Another was surprised to notice that at one school assembly not only did the students sit in fairly integrated groups, but the performances were completely integrated, to the extent that one skit had a "mother" with both black and white "children," and another had a black student portraying Abraham Lincoln.²³² Admittedly, the social mandate at the post-puberty level (jr. high-high school), to not engage in interracial dating is stronger than the social mandate to engage in interracial activities in the school, and leads to more self-segregation by race. Yet, the above analysis of the seminar students' collected data suggested that there is a good deal of integration going on in the BPSS.

It must be remembered, however, that the seminar students saw only the most superficial interactions between students and teachers, and even then, had little sense of how their presence distorted that interaction. With such a cursory visit, they were not able to determine whether the teaching fostered a good sense of self among the black students, enabled white students to learn about blacks and their culture in a positive way, or merely reinforced stereotypes. The seminar students did, however, notice the racial configuration of the power structure within the school they visited: the principals and teachers were predominantly white. As one commentator noted, "if the experience of desegregation only confirms the relationship of the powerful to the powerless in intergroups relations, the goals of integration have not been achieved."²³³

Looking at the notion of "success" from another angle, however, it is

229. This might be because the seminar students visited more elementary than junior high or high schools, and all noted the remarkable lack of self-segregation at the lower levels. See S. Faherty, Report on School Visit, Mar. 2, 1988 (unpublished seminar report); K. Miller, Report on School Visit, Mar. 2, 1988 (unpublished seminar report).

230. In school year 1987-88, 20.7% of the teachers and principals in the BPSS were minority, and 79.3% were majority. In 1986-87, the numbers were approximately the same. In both years, approximately half of the teachers' aides were minority and half majority. Phone interview with Shriver, *supra* note 125.

231. K. Miller, *supra* note 229.

232. S. Faherty, *supra* note 229.

233. Cohen, *Design and Redesign of the Desegregated School: Problems of Status, Power and Conflict*, in *SCHOOL DESEGREGATION* 260 (Stephan & Feagin eds. 1980).

almost foolhardy to ask if desegregation was successful. Desegregation is a continuous process, and the answer to that question will surely change over the life of that process. As Judge Curtin noted, one is always working with "a constant[ly] changing target."²³⁴ Unexpected factors and competing interests will impinge on the process. For example, federal and state laws which require the integration of disabled and non-disabled students ("mainstreaming")²³⁵ have had an unexpected impact on the desegregation process in Buffalo. To the extent that the desegregation order requires a certain racial balance in the schools, that balance must be calculated with the inclusion of the disabled also in mind. This complicated pupil assignments since disabled students are both white and black, yet only certain schools are accessible to students in wheel-chairs.²³⁶

The question of resources is also relevant here. A consent order in *Andres v. Reville* requires a certain number of professional staff and supervisors for the program to teach the trainable mentally retarded.²³⁷ Should the limited money available to the Board go towards programs for the disabled or towards the desegregation effort? Similarly, plans created to remedy racial segregation may work against that very goal and have to be re-adjusted. For example, if one of the goals of school desegregation is inter-racial harmony, busing students to achieve integration will work against that goal, where the buses leave right after school, and where school functions with important opportunities for positive inter-racial activities such as clubs, sports, and theater, are held after school.²³⁸

Solutions thus create new problems to be addressed. Solutions also create new constituencies for change. For example, the major constituency for the initial desegregation was the black community. Once the schools were physically integrated, and magnet schools and programs were in place, the constituency changed to those black parents whose children were not reaping benefits from the initial changes. This group included at various times the parents of those black school children not in magnet programs, parents of those in special education classes and the parents of black school children who were suspended or who dropped out of school. Thus, the presence of an institutional plaintiff such as the NAACP or CCHR, which maintains continuing pressure for whatever changed goals might be necessary, is crucial.

It is also clear that hard-won progress can be lost. The Buffalo school system was first desegregated in 1872. Resegregation was so complete that the

234. Curtin Tr. 1987, *supra* note 47, at 5.

235. See 20 U.S.C. § 1412(5)(B); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; 34 C.F.R. § 300.550, § 104.34. The BPSS is also bound by court orders in two cases concerning the adequacy of education provided to trainable mentally retarded school children and to all disabled school children, plus all those suspected of possessing a disability. *Nyquist*, 547 F. Supp. at 474 n.6.

236. *Nyquist V*, 547 F. Supp. at 474-75 & n.6.

237. *Id.* at 474 (citing *Andres v. Reville*, Civ. 80-482 (W.D.N.Y. May 27, 1982)).

238. *Reville Tr.*, *supra* note 7, at 39.

struggle to desegregate had to be started over again, by a new generation of black parents. More recently, with respect to the current integration process, Judge Curtin expressed his concern that a change in the composition of the Board could lead to less support for the integration process:

[T]here has been . . . a clear change in the community in attitudes, but . . . it is like health. You might have terrific health today, and tomorrow you are struck down with some very . . . serious illness. And that is the way the school system is, because things change all the time. It requires everlasting vigilance to be sure that . . . whatever good things happen continue. If you begin to sit back and say "oh, gee, we solved all our problems," . . . believe me, then you are in for a terrible, rude awakening.²³⁹

As Reville stated, "this is the hard part." The litigation moved the BPSS from the problem of moving bodies by bus from one neighborhood school to another, to the "second generation" desegregation problem: internal tracking, self-segregation within the schools, continued use of eurocentric materials, high drop-out and suspension rate of black students, and re-segregation.

As a community moves from one set of problems to the next, we must ask questions about the transfer of power in this process. For that is what the integration issue is about, and that is what the resistance to change by the white community is about. The black community wants the white community to give up some of its power, and the white community does not want to do so. We must ask, therefore, has any real power been transferred to the minority community? Or has the desegregation only effectuated a superficial reorganization which does not change the underlying power structure?

One way to understand the transfer of power is to analogize power to a bundle of sticks. When the group with power is asked to give up all of those sticks (all of its power), it generally does not do that. More likely, it will give up one of those "sticks," but not the others. One clear example can be seen in the employment field. Because there are now laws which forbid employment discrimination, blacks are being hired for jobs which were closed to them before. Thus, one "stick" is being given up — the job, one index of power. But the white community refuses to give up the other "sticks," that is, the notion that the black person who is hired can perform the job as well, if not

239. Curtin Tr. 1987, *supra* note 47, at 19-20. On May 2, 1989, in city-wide elections for all nine seats of the Buffalo School Board, five candidates backed by supporters of Mayor Griffin won. Buffalo News, May 3, 1989, at A1, col. 5. According to Reville, this presented the frightening prospect that the schools would be "taken over by a group hostile towards funding the schools." Buffalo News, May 2, 1989, at A7, col. 2.

On May 30, 1989, Reville announced that he was leaving Buffalo to become head of the school system in Little Rock, Arkansas, a city which is once again under court order to desegregate. Buffalo News, May 30, 1989, at A1, col. 2. He was leaving, he said, because he thought he had done what he wanted to do in the BPSS. Buffalo News, May 31, 1989, at A6, col. 1. Also, he found the position in Little Rock appealing because "it's so historic, such a challenge." *Id.*

better than, a particular white person.²⁴⁰

In the context of school desegregation in Buffalo, the white community gave up one "stick," one index of its status and power — schools segregated by race which showed the superiority of the white community. But it kept the other "sticks;" that is, it refused to give up notions of difference and superiority. It refused to accept a real change in identity or status. It refused to give up the power to name the winners and losers in society.²⁴¹ Black students may attend schools with white students, but they will be kept separate through ability tracking or placement in special education classes. Black students may attend the same classes with white students, but their inferior position in society will be maintained and strengthened by use of a eurocentric, racist curriculum. Thus, while a certain action by the powerful might be seen as reflective of social change, the system is merely reorganized to quell the imprecations of the minority without modifying the underlying dynamic of racial superiority and inferiority.²⁴² Reville could not have been more correct in characterizing the modification of this underlying dynamic as "the hard part."

V.

A COURT ADJUSTS TO ITS NEW ROLE

As noted earlier, the Buffalo school desegregation case is an example of the new form of judicial decision-making required in structural reform litigation. This form of litigation, which began in the 1950s with the school desegregation cases, requires judges to act in new ways. Instead of playing a passive, short-term role, the judge becomes an active participant in reforming the structure of a bureaucracy. The judge must not only decide if the agency has acted in an unconstitutional manner, she must also decide how that institution should be re-shaped to eliminate the constitutional violation, and must manage the reform process to ensure its elimination.²⁴³ This reform is, of necessity, a long-term process. As Judge Curtin described it, in this kind of case,

240. See, e.g., D. Bell, *The Price and Pain of Racial Perspective*, SOCIETY OF AMERICAN LAW TEACHERS, EQUALIZER 1 (Nov. 1986) (where white law professors, at the behest of dissatisfied white students, organized "enrichment lectures" to supplement the coverage of first-year Constitutional Law class taught by a visiting black law professor who is a tenured full professor at Harvard Law School and a nationally recognized scholar of constitutional law).

241. When "white flight" occurs, of course, the white community is refusing to give up even one stick in its bundle of power.

242. For an interesting interpretation of this process, see D. MONTI, A SEMBLANCE OF JUSTICE: ST. LOUIS SCHOOL DESEGREGATION AND ORDER IN URBAN AMERICA 23-26 (1985) (defining school desegregation in anthropological terms as "ritualized rebellion," wherein participants resolve disputes in an indirect and stylized manner without having to address the problems underlying the conflict). See also Reskin, *Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work*, 2 GENDER AND SOC'Y 58, 60 (1988) ("Dominant groups remain privileged because they write the rules, and the rules they write 'enable them to continue to write the rules.' As a result, they can change the rules to thwart challenges to their position.") (emphasis in original, citation omitted).

243. See generally Fiss, *supra* note 98; Chayes, *supra* note 103.

"[y]ou have a beginning, . . . a middle, and . . . a never-ending."²⁴⁴ The organization of the parties in structural reform litigation, as well as the relationship between the parties, is also different. New demands are placed on the judge. Because of these new structures and demands, questions have been raised about the proper role of the court and whether the court as now constituted is well-suited to do what is being asked of it. Thus, questions are raised as to both the integrity and the competence of the courts. These questions, both theoretical and practical, will be addressed in this section.

This section will first address the practical issues raised, that is, questions about the court's competence to handle structural reform. It will describe the new structures and roles in institutional reform cases and point out potential weaknesses in a framework which seeks to resolve major social policy issues through court-ordered institutional reform. Next, it will look at these weaknesses in the context of the Buffalo desegregation case to see how one judge addressed them.

This section will then address in two respects the theoretical issues concerning the proper role of the judiciary in a democratic society. First, because the court is required to become an active participant in a political process, questions are raised as to the court's independence and its institutional integrity. Again, this issue will be addressed in the context of the Buffalo case. Second, this section concludes with a discussion of a concern raised by John Ely in *Democracy and Distrust*.²⁴⁵ That concern was whether the twin democratic goals of egalitarianism and popular control can be harmonized in the role of the judiciary in our society. We will look at the model of citizen participation created by Judge Curtin in the remedial phase of the Buffalo desegregation case to see if it provides an answer to that inquiry.

A. Institutional Competence

A major new development created by structural reform litigation is the central role played by the judge in shaping and managing ongoing relief to modify a major social institution. For example, in Buffalo, Judge Curtin not only had to rule on whether or not the defendants had violated the constitutional rights of black school children, he also had to see that the school system was reformed in a way which would give meaning to the values of the Constitution. Hence, the court, of necessity, has been involved in a long-term, close relationship with the school system, a relationship which deepened over time. Judge Curtin called this type of case a "management-style case," and noted that the court had to get into the daily workings of the institution and know what is going on with some degree of specificity, if it is to be able to assess and reassess the direction of the remedial process.²⁴⁶ The judge is no longer merely a "neutral umpire" in a dispute, but an active participant in the

244. Curtin Tr. 1987, *supra* note 47, at 1.

245. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

246. Curtin Tr. 1988, *supra* note 110, at 14.

litigation.²⁴⁷

It has been suggested that courts might not have the right tools and skills to carry out this new assignment. One concern is that courts, as compared with legislators and agency administrators, have limited tools for coercion. They may not grant or withhold licenses and may not tax or grant economic incentives or subsidies to coerce implementation of their orders.²⁴⁸ How then will courts be able to ensure that their directives are followed? A second question concerns the ability of the courts to obtain sufficient information to carry out institutional reform. In these cases, judges need to know what is going on within the institution they are reforming in some detail in order to modify orders when needed and in order to address the unintended consequences of those orders, as well as new problems. They therefore need detailed feedback during the entire reform process. In an agency, one could send out investigators or hold a hearing. However, since the judicial process is not a self-starting one, the judge must rely on the parties to call a problem to her attention. How can she be sure that the parties will call important issues to her attention? The very factors which underly the integrity of the court — a judge's isolation and independence from the political world, make it difficult for her to get all the information necessary to make informed decisions.²⁴⁹ Finally, structural reform litigation places a heavy burden of long-term management on a judicial system which was not created for that purpose.²⁵⁰ What kinds of implications does this have for the time available to other cases on the docket?

We find suggested answers to these questions by looking at how Judge Curtin "managed" the institutional reform of the Buffalo school system, for in structuring relief, he built in mechanisms to address some of these problems of "fit" between his court as now constituted and the demands of this structural reform litigation. First, Curtin recognized the problem of the court's inability to get adequate information.

[When] you run a board of education, you have a lot of staff people looking into details. We don't have any of that, so it's sort of a clumsy way to do it. But really there was no other way to do it, so we have to do our best with what we have.²⁵¹

In addressing this issue, Curtin stepped neatly around the fact that litigation is "self-starting" by not letting the parties get too far away from him. Indeed, by meeting weekly with the parties during at least the first six years of the remedy phase, he ensured that he would not need a "starting" mechanism, because the

247. Chayes, *supra* note 103, at 1286.

248. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 34-35 (1977). One important coercive tool the judge does have is her ability to rule on funding issues, and thereby force the city to pay needed money for desegregation. As one commentator has noted, however, this will likely create a "bureaucratic temptation to manipulate the courts into ordering changes that will have the effect of expanding bureaucratic budgets." *Id.* at 257-58.

249. *Id.* at 35-36.

250. Chayes, *supra* note 103, at 1300.

251. Curtin Tr. 1988, *supra* note 110, at 57.

case would never "stop." The parties were before him regularly, providing him with constant feedback.²⁵² He created a citizens' group which monitored compliance for the first several years and reported back to him on problems in the reform process. Finally, Curtin created an open-door policy with respect to all of the community. It was such an effective policy that in 1988, twelve years after the liability ruling, he was still receiving communications from parents concerning problems with the schools. Curtin admitted that a lot of mistakes were made, but he tried to rectify them as soon as possible.²⁵³ By using these various devices, he attempted to ascertain what was going on in the schools. The information he gathered enabled the court to address problem areas by modifying the thrust of the reform process.

Curtin also recognized that courts possess rather limited coercive tools. In particular, Curtin noted the weaknesses in giving orders.²⁵⁴ To get around this weakness, he arranged for the parties to sit and talk together until they arrived at an agreement. Curtin also held frequent meetings with the parties to iron out difficulties in the restructuring process. To coerce the public, (i.e., individuals *not* before the court) Curtin used the same strategy of holding meetings within the community and getting the people to talk together. This approach was intended to encourage people to arrive at a peaceful resolution with respect to the court order to desegregate.

Finally, with respect to the burden that this strategy imposed on the court, Curtin himself noted that managing this type of case was a "terribly time-consuming sort of thing." Because he refused to appoint a master or staff to handle the on-going management of the case, the entire burden fell on the judge. Recently however, on the issue of funding, he delegated the mediation and fact-finding to other entities: first, to a citizens' committee which was to mediate the dispute, and then to Magistrate Maxwell, to hear the dispute and to compile a record upon which he could base his decision.²⁵⁵ Judge Curtin thereby created a structure wherein he could delegate some of the management burden while still retaining control (both perceived and real) over the process. Thus, Curtin addressed the issue of the capacity of the court to shape and manage institutional reform with respect to adequate information, coer-

252. See *supra* note 52 and accompanying text. Judge Curtin considered his role crucial to the success of those early meetings where the details of the desegregation process were worked out. In his view, some outsider, like the court, had to be there to say "this is the thing to do." Curtin Tr. 1988, *supra* note 110, at 16.

Curtin was also willing to ask the parties to act as the court's investigators. Hochfield related one instance of this which took place when, after the first few weeks of Phase I, there was trouble brewing at Riverside High School. At that time, Judge Curtin asked her to go to the school and see what was going on, and report back to him. Hochfield Interview, *supra* note 30, at 41.

253. Curtin Tr. 1988, *supra* note 110, at 24.

254. Curtin Tr. 1987, *supra* note 47, at 4.

255. The nature of the burden that was shifted from the court to the magistrate is shown by the fact that Magistrate Maxwell heard testimony on this matter for 50 days, whereas oral arguments before Judge Curtin on the issue of whether the magistrate's report should be adopted lasted only one day. *Nyquist VII*, 618 F. Supp. at 808.

cive tools and management burden.²⁵⁶ These issues are all relevant to the new, central role of the judge in structural reform litigation and the problems raised by that new role.

In addition to the problems created by the judge's new role, institutional reform cases raise a second problem: discerning plaintiffs' real interests and identifying those who represent those interests. The plaintiff is not an individual but a group or groups, or as here, several individuals and two groups. Thus, the spokesperson may be a different person from the victim, and the spokesperson and the victim may want different things. Similarly, there may be several spokespersons for plaintiffs who want to proceed differently.²⁵⁷ In fact, in this case there was such conflict between the plaintiff groups that at one point counsel for the national NAACP refused to defend the district court order requiring the city to provide more money for the desegregation effort, much to the surprise of the Second Circuit.²⁵⁸ Instead of a clear bi-polar structure, the party has become "sprawling, and amorphous, subject to change over the course of the litigation."²⁵⁹

Related to this problem is the new relationship between defendants and plaintiffs. In structural reform cases, the typical adversary relationship one expects in a lawsuit is upset. Plaintiffs and defendants commonly want the same reform outcome, and prefer that the remedial process consist of negotiation and mediation. In this case, Curtin noted that the case would have been much more difficult to handle had plaintiffs and defendant not accepted the need for integration of the schools. He observed the spirit of cooperation between the parties, and stated that the nonconfrontational meetings over the years had made a difficult task possible. In fact, during one funding dispute, the parties were actually realigned so that plaintiffs, defendants the Board and the Common Council were all aligned against the Mayor.²⁶⁰

The issue raised here, then, is one of representation. How can the court be sure that the party bringing the claim is representative of the group it claims to represent when there are several groups on one side, each taking a

256. Indeed, Judge Curtin suggested that in some ways a federal district court may handle social reform issues better than an agency, as it does not have any kind of "agency ambition." In addition, to the extent that the court is also concerned with due process and constitutional issues, it is better able to "look at the bigger picture" than is an agency. Curtin Tr. 1987, *supra* note 47, at 42-43. For a concurring view, see M. HOCHFIELD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESIGN* 138-39 (1984) (arguing that courts sometimes produce better policies as they may develop better plans, order disbursement of sufficient funding, and give school officials the power to make long-needed changes).

257. Fiss, *supra* note 98, at 18-23.

258. See *supra* note 83; cf. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

259. Chayes, *supra* note 103, at 1284.

260. See *Nyquist VII*, 618 F. Supp. at 808 ("[T]his case, especially in its present posture, is not a typical lawsuit. Both of the principal antagonists on these motions are defendants."). Curtin also noted the difficulties of trying the case with the parties so realigned, stating that "[t]he relationship between the Board and the City and their status as co-defendants make it difficult to apply burden of proof rules in the ordinary fashion." *Id.* at 809.

different position? How can the court be sure when plaintiffs and defendants appear to be on the same side of the case? And what about all of the people who will be affected by the outcome of the suit who are not even arguably represented in court? Should not their interests be considered during the overhaul of a major social institution even though they are not parties to the suit?

To address these concerns, Curtin opened the case up to greater representation in two different ways. First, he insisted that defendants go out into the community and ask local community groups what they wanted to see in their schools. He emphasized that he particularly wanted defendants to get feedback from the black community, thereby addressing a concern that the NAACP perhaps did not represent the views of the entire black community in Buffalo.²⁶¹ Further, Curtin wanted to make sure that the entire community was involved, including the colleges, the local bar and other professionals.

Judge Curtin opened up the case in a second way using the medium of intervention. Early on in the remedial phase, he required the Board to notify parents that they could object to proposed plans by filing an application to intervene with the court.²⁶² He also allowed intervention in the proceedings at several stages: initially, by community groups that wanted to comment on the first proposed desegregation plans; and later by organizations representing several classes of children not directly represented by plaintiffs (latinos and disabled), as well as by several unions, all of whom claimed an interest in the court's remedial order concerning the hiring, promotion and assignment of minority staff and teachers. Judge Curtin thus sought to address the problems created by the new party structure and the new relations between the parties through broader representation of community interests.

It is clear from the judge's actions in this case that the changes in society which led to the new responsibility of the courts for structural reform of major institutions have led the courts to make changes in their own structure and operation in order to address new needs. As one commentator has noted, it is not so terrible that the changes in society have led to changes within the judicial system. What would be alarming is if those societal changes did not lead to concomitant changes in the adjudicatory forms of the courts.²⁶³

B. Institutional Integrity

As noted earlier, courts managing institutional reform cases face the fact of their limited coercive tools. How would Judge Curtin get compliance with his orders to desegregate, especially from those citizens who were not parties to the suit? We have seen that one of his strategies was to set up meetings in the community in order to achieve compliance by having the public talk through some of its concerns and anger. He also did not order defendants to take steps that would lead to widespread defiance of his orders, thus obviating

261. Cf. Bell, *supra* note 258.

262. See *supra* note 54.

263. Fiss, *supra* note 98, at 36.

the need for coercion. While these strategies provided one solution to the problem raised by the limited coercive tools at his disposal, they raise new problems about the court's legitimacy.

In "Foreword: The Forms of Justice," Fiss suggested that questions of legitimacy arise where the judicial process poses a threat to the court's independence.²⁶⁴ He further suggested that by requiring the court to both declare rights and actualize them, one thrusts the court into the world of politics and a network of relationships which threaten its independence, and thus the integrity of the judicial enterprise as a whole.²⁶⁵ Because the judge must devise strategies to be effective, and must anticipate the response of the public to those strategies, it is likely that he will tailor the right to fit whatever remedy is obtainable, on the theory that getting half of what one is entitled to is better than getting nothing.²⁶⁶

We can see that Judge Curtin was led to adopt this strategy as he stretched out his requirements for system-wide desegregation over time to ensure that the whole process would not collapse. He was, in essence, bargaining for long-term, successful desegregation with plaintiffs' constitutional rights to immediate desegregated schooling. This dilemma, as Fiss pointed out, is not one of the judge's making. Society requires the courts to play an active instrumental role in social reform while still expecting a neutral, independent judiciary. The way out of the dilemma, Fiss concluded, is to accept the fact that there is no way out of it, and that the court will necessarily continue to straddle the world of the Constitution and the world of politics.²⁶⁷

C. Popular Control and Egalitarianism

Judge Curtin's style of community participation in managing structural reform and his fervent belief that courts should work within a democratic framework to the extent possible in order to obtain the best result lead us to another interesting question concerning the role of the court in a democratic system. In *Democracy and Distrust*,²⁶⁸ John Ely addressed the question of how courts can give weight to the majoritarian principles of democracy even while they attempt to protect the rights of minorities from the majority. He suggested that both goals of popular control and egalitarianism, while apparently inconsistent, are concerned with participation in the democratic processes, and could be harmonized through a "participation-oriented, representation-reinforcing" approach to judicial review.²⁶⁹ One might wonder if the representation framework Judge Curtin used to reform the public school system is an example of Ely's "participation-oriented, representation-reinforcing" function of the courts.

264. *Id.* at 44-52.

265. *Id.* at 53.

266. *Id.* at 54-55.

267. *Id.* at 57-58.

268. *See supra* note 245.

269. *Id.* at 86-87.

Superficially, it is easy to see the differences between Ely's theory and the model suggested by Curtin's approach. Ely was talking about the court performing its "representation-reinforcing" function when, for example, it supported voting rights for a minority. The court was "clearing the channels of political change" to ensure that there was real representation. By assuring that various groups are indeed represented, the court helps them to participate in society's democratic process through which they can then protect their interests.²⁷⁰ Here, however, the substantive right at issue was equality in the public schools rather than the right to participate in a democratic process of representation. Instead, the minority interest was protected by the court, and the representation component appeared when the court shaped the new structure. To that extent, Curtin's model and Ely's are different. But if Ely is not talking about rights versus process, but rather about how to protect minorities from the majority without contradicting fundamental principles of democracy, then Judge Curtin's decision to develop the remedy in this case through consultation with the community is an important variation of Ely's model.

There is an inherent danger in this model, however. The danger lies in opening up the remedial phase for the majority to determine how to enforce the constitutional rights of the minority after decades of single-minded assault on those very constitutional rights by the majority. The danger is that the remedy designed will not be adequate if the majority gets to control the shape of that remedy.

The risk is minimized in this case, however. Although the judge encouraged input from the community in the remedy process, he did not open it up in the sense of "one person, one vote." In Ely's model, when the court extended the franchise, each person's vote counted in a real way. If enough of those votes were amassed, the majority would be able to have its way. That is not the way the "representation" functioned in the Buffalo school desegregation remedy phase. In the Buffalo case, citizens were given a chance to speak, and perhaps their comments were taken seriously. But the result was preordained. The schools would be desegregated. The judge was probably correct in stating that even if the community did not get what it wanted, it was still important that the community had its say. This is quite different from saying that there would be popular control over the desegregation process. It is likely that what the judge was doing in this case was "politicking," that is, building constituencies to support his program for enhancing minority rights.

The irony here is that to the extent that the judge opened up the remedial process in a truly democratic way (one person, one vote), his ability to protect the interests of the minorities who came to court seeking protection might have been diminished. But to the extent that he did not (and certainly he cannot) allow a truly democratic process to control the remedy, he was able to protect the constitutional rights of the minority. The tensions between popu-

270. *Id.* at 99.

lar control and egalitarianism that Ely saw resolved in his "representation-reinforcing" model are thus not fully resolved in Judge Curtin's model.

CONCLUSION

This Article has looked at school desegregation in Buffalo by focusing on the acts of the judge, the key player in any structural reform litigation. It has shown the important role Judge Curtin played in the *planning* stage of the remedy, where he urged the community to see desegregation as a chance to create a better school system, and insisted on community participation in the planning process. By so doing, the judge let the community know it would get something in exchange for what it was giving up. He provided an outlet for the community to express its feelings about desegregation in a controlled setting. Moreover, Judge Curtin brought other elites into the planning process, thus providing more support for his orders. With respect to *timing* the process of desegregation, we have seen that Judge Curtin allowed the Board to proceed slowly in order to give it time to plan carefully and to allay the fears of parents. The judge was aware that the partial remedies proposed by the Board which he accepted were likely reversible on appeal, but he had the sense that in Buffalo, actualizing the rights of black school children immediately would probably have long-term negative effects on those same rights. This approach was supported by the fact that it was not until five years after the first order to desegregate that there were wide-spread mandatory assignments for racial balance. Moreover, during that five-year period there had been partial, largely voluntary desegregation that had proved to be successful. Hence, when wide-spread forced busing finally took place in 1981, it fit within the social norms of the community, and caused no violence. The new Buffalo norms of desegregated schools expanded easily to accommodate mandatory busing to actualize that norm.

Judge Curtin's personal, hands-on style of *monitoring* the process was also important. His daily contacts with the parties, and his open-door policy with non-parties made it possible for him to learn quickly of mistakes and to rectify them. Changes within the school system were facilitated because Curtin could arbitrate disputes between the parties immediately, thus avoiding the more time-consuming formal court processes. He was willing to commit a lot of time to this process, willing to use many ways of monitoring, willing to be flexible about what the court should and should not do, and willing to push against the limits of his authority to get the job done.²⁷¹ Judge Curtin had a strong sense that he knew the Buffalo community and how to work with it to achieve this goal. In sum, he had enough distance from the community as a judge to be clear what had to be done to give meaning to the constitutional

271. Curtin Tr. 1987, *supra* note 47, at 21. See also Hochfield, *supra* note 256, at 136 (suggesting that courts which are rigid, shallow and naive manage the desegregation process badly).

values implicit in *Brown* and enough closeness to the community to be able to actualize those values.

This Article also showed how important institutional actors supported the judge's orders, and developed the themes which he set out. Eugene Reville picked up on the theme of community involvement and developed it. He also developed the notion that the community would be getting an excellent school system in exchange for desegregating the schools. Reville's support was also important as he explained what kinds of sanctions the court had available to coerce compliance with its orders, that is, intervention by the executive branch of government. The support of the religious community showed the city that the desegregation process was not just a dialogue between the court and the Board. It was a community-wide project. By working together as members of different faiths and different races, the religious community showed the possibility of building community out of diversity and the power of that type of coalition. The combined support of all of these actors was crucial in obtaining peaceful desegregation in Buffalo.

This Article also demonstrated that Buffalo can claim "success" for its peaceful desegregation of the schools. Part of the reason Buffalo can make this claim is the ease with which one can define "desegregation." There are very few schools left in the system which are predominantly majority or minority schools. Black and white school children do in fact attend school together in Buffalo.

Beyond this fact, however, the notion of "success" is more problematic. The very definition of "success" varies by one's mandate and one's constituency, and even within that framework, the definition varies over time as some problems are solved, and others appear. Many things have changed at BPSS since the first court order in 1976: standardized test scores are up throughout the system, some schools are considered excellent, and there is a lot of excitement generated by the magnet schools. This Article has also shown, however, that many problems remain with respect to the treatment of black children in the desegregated schools. As Reville stated, eliminating racism within the BPSS is the next task, and the hardest task.

There is only so much that one judge can do. Judge Curtin and the BPSS exist in the middle of a "complicated fabric"²⁷² which includes many other players — the Common Council, the Mayor, the federal government, the students, the parents and the teachers' unions. Many other constraints exist, such as the consent decrees with respect to students with disabilities and rulings from superior courts. Not only do these other players and obligations exist, but they change over time.

Part of this "complicated fabric" of change includes the new expectation that courts shape and manage institutional reform, which results in courts acting in new ways to adjust to the new expectations. This Article has shown

272. Curtin Tr. 1988, *supra* note 110, at 5.

how Judge Curtin created new tools and structures to meet these new expectations. The major thrust of the changes were to open the court processes to the public, to bring the community into the work of the court by soliciting community input on the shape of the remedy, by maintaining an open-door policy for the public, by soliciting intervention from citizens affected by the orders, by granting permissive intervention liberally and by forming citizen groups to monitor and to negotiate the funding dispute. Curtin's model does not fit Ely's vision of harmonizing the apparently inconsistent goals of popular control and egalitarianism; nonetheless Curtin's model, which attempts to democratize the remedy process in rights-based litigation, is an important variation of Ely's model. This Article also showed that the new expectations facing courts create tension between the court's independence and the requirement that it operate in a political way in order to reform the institution in question. The solution to that tension, as Fiss suggested, and as Curtin indicated, is to simply do the task one is expected to do, while recognizing that there is no way to resolve that tension.

Although this Article focuses on Judge Curtin's role in this case, it should be remembered that his orders concerning the desegregation of the Buffalo school system came in the middle of a long political process, one that began some 140 years ago when black parents first petitioned for their children to leave the black school and attend the better-provisioned white schools. This case is only one step in that continuing process. What the litigation did was to add one more player, the judge, a player with "considerable formal authority,"²⁷³ to this political process.

While answering some questions, this Article suggests many more for further research. The first area for additional consideration is the political and social environment of the white communities in Buffalo. How much cohesion was there among the different groups? Did they split on the issue of racism? What elements in this environment enabled peaceful desegregation to occur? The second area is the nature of the different black communities in Buffalo. How did they respond to the court orders to desegregate? Did they feel that they were adequately represented by the NAACP and by CCHR? The final area is the resegregation of the Buffalo schools after their initial desegregation in the nineteenth century. What factors caused this resegregation? Do those same factors exist today? Further research into these areas will deepen our understanding of the process of school desegregation in Buffalo, as well as our understanding of the dynamics of social change.

273. Kirp, *Legalism and Politics in School Desegregation*, 1981 WISC. L. REV. 924, 934-35.